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Douglas Autotech Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822. Case 7-CA-51428

November 18, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On January 5, 2010, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. The Acting General Counsel and the Charging Party filed cross-exceptions and supporting briefs, the Respondent filed an answering brief to the Charging Party's cross-exceptions, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions as modified, to modify his remedy,³ and to adopt the recommended Order as modified.⁴

¹ The Respondent has requested oral argument. The request is denied, as the record, exceptions, arguments, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

We find it unnecessary to pass on the Respondent's exception to the judge's order that it produce subpoenaed documents for in camera inspection so that the judge could consider the Respondent's contentions that they are protected by the attorney-client privilege, work-product doctrine, and/or bargaining-strategy privilege. Although the Respondent refused to comply with the order, the judge drew no adverse inferences and he closed the record without inspecting the documents subject to the order, based on his determination that the submitted evidence was adequate to decide the case. Hence, the Respondent has suffered no prejudice.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), *enf. denied* on other grounds 647 F.3d 1137 (D.C. Cir. 2011), we modify the judge's remedy by requiring that

The central issue in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging approximately 146 employees in the wake of an economic strike. It is undisputed that the strike was unlawful due to the Union's failure, before the strike, to file a notice with the Federal Mediation and Conciliation Service (FMCS), as required by Section 8(d)(3) of the Act. It is further undisputed that, pursuant to the loss-of-status provision in Section 8(d)(4), the strikers thereby lost their protected status as "employees" under the Act. The judge found, however, that following the strikers' unconditional offer to return to work, the Respondent "reemployed" them within the meaning of Section 8(d)(4) by imposing a lockout without reserving its right to discharge them, and the strikers therefore regained protected status under the Act. The judge consequently found that the Respondent violated Section 8(a)(3) and (1) by discharging the entire bargaining unit based on the employees' participation in the strike and violated Section 8(a)(5) and (1) by subsequently refusing to bargain with the Union regarding the terms and conditions of employment of the unit members.

We agree with the judge, essentially for the reasons he gave, that the Respondent violated Section 8(a)(3) and (1) by discharging the entire bargaining unit on August 4, 2008. We find further, under a separate rationale, that the Respondent violated Section 8(a)(3) and (1) by discharging 33 unit members who were on layoff status or authorized leave during the strike. Additionally, as explained below, we have modified the recommended remedy to adapt it to the specific circumstances of this case.

I. FACTS

The Union has represented the Respondent's employees at its Bronson, Michigan plant since 1941. The parties' most recent collective-bargaining agreement expired by its terms on April 30, 2008.⁵ On February 19, the Union served the Respondent with written notice of its intent to terminate the contract, as required by Section 8(d)(1) of the Act. On the same date, union representative Phil Winkle instructed his secretary to prepare a notice to the FMCS, as required by Section 8(d)(3).

On May 1, after extensive negotiations failed to yield an agreement, the Union commenced an economic strike.

backpay and other monetary awards shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform to the findings herein. We shall also substitute a new notice to conform to the recommended Order as modified. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁵ All dates are in 2008 unless otherwise indicated.

The Respondent continued to operate with temporary replacement workers. On the afternoon of May 2, Winkle learned that the requisite FMCS notice had not been filed. On May 3, he conferred with representatives of the International Union concerning the effect of the failure to file the notice. They determined that the strike was unlawful and that the best course of action would be to make an immediate and unconditional offer to return to work on behalf of the striking employees. On May 4, the unit members voted to end the strike.

At about 7 a.m. on May 5, Winkle faxed a letter to the Respondent's human resources department stating that the striking employees "are immediately returning to work unconditionally," and the day-shift employees reported to the plant prepared to work. Shortly before 8 a.m., Winkle filed the required notice with the FMCS.

In response to the Union's unconditional offer to return to work, the Respondent's outside counsel, Bruce Lillie, requested a meeting with the Union's bargaining committee for that evening. At the meeting, the Respondent presented a letter to the Union that stated in pertinent part:

Earlier today, the Company received the Union's request to return from the strike. The offer to return to work was unconditional.

Please be advised that effective immediately, the Company is locking out the bargaining unit in support of its bargaining position. (See attached.)

Please advise the Company as soon as possible if the Union accepts the proposal and when an Agreement has been reached so that employees can be expeditiously returned to work.

Attached to the letter was a document entitled, "DOUGLAS AUTOTECH COMPANY PROPOSAL/GENERAL SYNOPSIS AND SUPPORTING DOCUMENTS." The document set forth a number of proposed changes to the expired collective-bargaining agreement. However, the document was not a final proposal under which the unit members could return to work immediately if accepted by the Union. The proposal did not address some issues and was incomplete as to others. Both parties understood that further negotiations would be necessary before a final agreement could be reached.

The Respondent's director of human resources, Paul Viar, testified that before the Respondent met with the Union on May 5, company officials "suspected that the strike was illegal and that the [FMCS] notice had not been filed," based on the Union's decision to end the strike abruptly, only a few days after it had begun. He testified further that Lillie asked him to search the Respondent's files before the meeting to determine whether

the Respondent had received a service copy of the FMCS notice. Viar testified, "[W]e knew something . . . was wrong because I couldn't find it," and "we had a discussion about the potential impact of that 30-day notice not being in the record." Based on the credited testimony, however, the judge found that, when the Respondent announced the lockout at the May 5 meeting, it "did not raise any issue regarding the legality of the Union's strike, nor did it make any reservation of rights, either orally or written, concerning that matter."

The parties met again on May 21, in the presence of a mediator.⁶ The Respondent prefaced this meeting with a statement that it believed the strike was unlawful and that by meeting with the Union the Respondent was not waiving any rights or remedies afforded under the Act. The parties then discussed the Respondent's bargaining proposal, and the Union presented a counterproposal. No agreement was reached.

On May 23, the Respondent obtained confirmation from the FMCS that the Union had not filed a notice of dispute with that agency before the strike, as required by Section 8(d)(3).

The parties held 10 additional bargaining sessions, on June 2 and 13, July 1, 2, 14, 15, 24, 25, 28, and 31. A mediator attended each session. Over the course of these sessions, the parties exchanged detailed contract proposals and engaged in intensive negotiations.

At the June 2 negotiating session, Winkle asked about the status of the replacement workers at the plant. Viar responded, "We've told you that the replacement workers are temporary. They're on temporary status." Director of Finance Glenn Kirk added, "[W]hen we get a contract and . . . you guys come back to work, they go out."

At the June 13 session, Winkle asked for further assurances that the replacements were temporary. Lillie responded, "Let me get it straight. . . . [O]nce we get a contract, everybody goes back to work. . . . That's our goal. That's our goal. Once we get a contract, everybody goes back to work."

By letter dated June 13, the Respondent advised the Union that it was ceasing to honor employees' dues-checkoff authorizations because the collective-bargaining agreement had expired. The Respondent stated that it had no objection to employees voluntarily continuing their membership in the Union and paying dues, adding that "[n]o matter what decision is made by an employee, it will not affect the employees' [sic] job at the Company."

⁶ A mediator was assigned to the dispute in response to the notice that the Union filed with the FMCS on May 5.

At the July 2 session, Winkle again inquired about the status of the replacement workers. Viar responded, “We’ve told you that the replacement workers are temporary. They’re on temporary status. We have meetings with them all the time, inform them of that.” Kirk added, “We have formulated a transition plan, and we have meetings--weekly meetings and sometimes every other day with those employees. They know, when we get a contract and . . . you guys come back to work, they go out.”

At the July 24 session, there was, as found by the judge, an “ominous shift in the Company’s thinking.” Lillie told the Union’s attorney:

[H]e had been advising the Company all along that they should not try to fire the Union workers. . . . [H]e was continuing to give them that advice, but they wanted a second opinion from these other lawyers and . . . the other lawyers . . . had said that the Company had an 85 percent chance of prevailing if they fired the Union workers. . . . [H]e was continuing to advise them that that was too risky. . . . They were still taking his advice at that time, but he was afraid that he might be losing control of his client.

At the July 25 session, the Respondent presented a complete proposal, which included settlement of unfair labor practice charges and the return to work of a portion of the bargaining unit. The Respondent’s proposal characterized the unit members who would be brought back to work as “strikers/locked-out employees.” The Union offered its own proposal, which included what it regarded as a significant concession—a reduction in existing job classifications from 37 to 5. (The Respondent’s position was that the classifications should be reduced to three.)

On July 31, the parties met for 8 hours. Toward the end of this meeting, Lillie told the Union’s bargaining committee that “the Company was no longer going to waive their rights under the law, and that it may terminate all the employees.”

By letter dated August 4, the Respondent’s new counsel, William Pilchak, notified the Union that the Respondent was formally terminating the employment of the “illegal strikers.” On the same date, the Respondent sent letters to every member of the bargaining unit informing them that “[y]our employment with Douglas Autotech Corporation is terminated effective immediately because of your participation in the illegal strike of May 1, 2008 and thereafter.”

The parties stipulated that there were 33 employees on layoff status or authorized leave during the strike.⁷ In discharging the entire bargaining unit on August 4, the Respondent made no attempt to distinguish between unit members who participated in the strike and those who did not.

The parties had previously scheduled a negotiating session for August 14. Both parties attended despite the discharges. When the Union’s representatives arrived, they were informed by the mediator that the Respondent would not meet with them. The Union’s representatives then went to the conference room being used by the company, where Lillie informed them that the Respondent would not bargain because “[a]ll the employees have been terminated.” Lillie added that the Respondent would bargain with the Union over effects. The Respondent has since responded to the Union’s information requests pertaining to the effects of the discharges.

II. DISCUSSION

A. *The Alleged 8(a)(3) Discharges*

1. Analytic framework

In defining the duty to bargain, Section 8(d) includes notice requirements that must be satisfied prior to termination or modification of a collective-bargaining agreement.⁸ The notice requirements are designed to minimize the interruption of commerce resulting from strikes and to promote the use of mediation to assist parties in settling their labor disputes peaceably.⁹ Section 8(d)(1)

⁷ The parties stipulated that 30 employees were on layoff status, 2 were on authorized sick leave, and 1 was out on workers’ compensation. The parties dispute the status of another employee, Becky Vickers.

⁸ In pertinent part, Sec. 8(d) of the Act provides:

[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification. . . .

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute. . . .

(4) Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute . . . but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

⁹ *Boghossian Raisin Packing Co.*, 342 NLRB 383, 384 (2004); *Retail Clerks Local 1179 (J. C. Penney Co.)*, 109 NLRB 754, 758–759 (1954).

provides that the party desiring to terminate or modify a collective-bargaining agreement must serve upon the other party written notice of the proposed termination or modification 60 days prior to the expiration date of the agreement. Section 8(d)(3) requires that the same party notify the FMCS and the appropriate state mediation agency of the existence of a dispute within 30 days thereafter. The Act provides significant consequences if employees strike within these notice periods: Section 8(d)(4) provides that each striker “shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10” of the Act.

The Board has applied Section 8(d)(4)’s loss-of-status provision in strict accord with its terms. In *Boghossian Raisin*, supra, on facts similar to those here, the Board majority found that strikers lost their status as employees, and thus were lawfully denied reinstatement, when, due to a clerical error, their union failed to file the 30-day notice to the FMCS required by Section 8(d)(3). See also *Fort Smith Chair Co.*, 143 NLRB 514 (1963), enf’d. 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964); *Retail Clerks Local 1179 (J. C. Penney Co.)*, supra.

However, and central to this case, loss of status under Section 8(d)(4) is not irrevocable. Section 8(d)(4) further provides that “such loss of status for such employee shall terminate if and when he is reemployed by such employer.” What constitutes “reemployed” under Section 8(d)(4) was addressed by the Board in *Fairprene Industrial Products*, 292 NLRB 797, 802–803 (1989), enf’d. mem. 880 F.2d 1318 (2d Cir. 1989), cert. denied 493 U.S. 1019 (1990). In *Fairprene*, the union engaged in an economic strike without filing the requisite notice with the FMCS. The employer suspected that the strike was unlawful, but it did not have confirmation of that fact. The employer nonetheless entered into a verbal agreement with the union to return the strikers to work without reprisals, under the terms and conditions of employment set forth in the employer’s prestrike offer. Two hours later, but before the strikers had returned to work, the employer received confirmation that the strike was unlawful, and it immediately discharged 15 of the former strikers for their participation in the strike. The judge, affirmed by the Board, found that the discharges violated Section 8(a)(3) because the employer had “reemployed” the former strikers when it entered into the strike settlement agreement, the strikers therefore regained protected status under the Act, and it was immaterial that they had not physically returned to work when the discharges occurred. 292 NLRB at 802–803.

In a similar vein, in *Shelby County Health Corp. v. State, County & Municipal Employees Local 1733*, 967 F.2d 1091 (6th Cir. 1992), the court held that an employer, by entering into a strike settlement agreement, “reemployed” strikers who had lost their status as employees under Section 8(d)(4). Pursuant to the settlement agreement, a majority of the strikers would receive 4-day suspensions while other strikers would be subject to more serious disciplinary action up to termination, depending on their level of participation in the strike.¹⁰ The settlement agreement also provided that any disputes arising from the imposition of such discipline would be resolved through the parties’ normal grievance and arbitration process. A dispute arose when the employer terminated an employee for his participation in the strike, and the matter was submitted to arbitration. The arbitrator found that the penalty of discharge was too harsh, and directed that the employee be reinstated without backpay. The employer sought to have the arbitration award overturned as against public policy. In upholding the arbitration award, the court stated pertinently as follows:

Section 158(d) does not mandate the discharge of any individual participating in an illegal strike, it merely deprives that individual of certain statutory rights. The employer then has the discretion to either discharge or retain the employee. If the employer decides to retain the employee, that employee then regains the protection of the Act pursuant to § 158(d). In other words, an employee does not forfeit forever the protection of the NLRA by engaging in an illegal strike. The employee is unprotected only until the employer exercises the discretion implicitly granted by § 158. Since the employee loses the protection of the Act because of his conduct, the employer is therefore not barred from terminating the employee for participating in the strike. But once the employer decides not to discharge the employee, that employee is once again brought under the protective mantle of the NLRA.

967 F. 2d at 1096.

2. The judge’s decision

Here, it is undisputed that the strike was conducted in violation of the notice requirements of Section 8(d)(3) and that the employees who participated in the strike suffered the loss of protected status specified in Section 8(d)(4). Accordingly, the judge’s analysis properly focused on whether the Respondent “reemployed” the former strikers within the meaning of Section 8(d)(4).

¹⁰ In *Shelby*, the union members engaged in a strike in violation of the Secs. 8(d) and (g) notice requirements for employees of health care institutions.

The judge found that the Respondent “reemployed” the former strikers on May 5 by imposing a lockout in response to their unconditional offer to return to work without reserving its rights under Section 8(d). Citing *Fairprene*, supra, and *Shelby*, supra, the judge explained:

When confronted with an illegal strike, an employer is vested with the full discretion to frame its response. It may choose to discharge the strikers or it may select an alternative approach. If it selects such an alternative . . . it cannot renege on that choice. By selecting an alternative, the strike has ended and the strikers have regained the protective mantle of the Act. . . . Any subsequent unlawfully motivated discharge will violate the law.

The judge stated that, insofar as the above principles are concerned, he could perceive no difference between an employer’s selection of a settlement agreement (as in *Fairprene* and *Shelby*) or its invocation of the economic weapon represented by a lockout. In either case, the judge stated, the strike has ended and the former strikers are again under the Act’s protection.

The judge emphasized that by choosing the term “reemployed,” which is derived from “employee,” in drafting Section 8(d)(4), Congress intended to encompass the broad concept of an ongoing relationship between an employer and an employee.¹¹ The judge noted that Section 2(3) of the Act provides that “[t]he term ‘employee’ shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute.” The judge found that when one applies the statutory definition of “employee” to the facts of this case, the outcome is apparent: when the Respondent announced that it was locking out the former strikers in support of its bargaining position and assured the Union that “the employees can be expeditiously returned to work” as soon as the parties reached agreement on a new contract, the former strikers became “individual[s] whose work has ceased as a consequence of, or in connection with, [a] current labor dispute.”

As the bargaining unit members were then protected from discrimination on the basis of their union affiliations and activities, the judge found that their discharge on August 4 for the stated reason of their participation in the strike was unlawful. The judge emphasized that the uncontroverted evidence establishes that the Respondent discharged not only those unit members who withheld

their labor during the strike, but also unit members who were on sick leave, workers’ compensation, or layoff status throughout the strike. The only common denominator was the union affiliation of the discharged employees. The judge therefore concluded that the Respondent engaged in conduct that was inherently destructive of protected rights and lacking any legitimate business purpose, in violation of Section 8(a)(3) and (1) of the Act.

3. Analysis

We agree with the judge, essentially for the reasons stated in his opinion, that the Respondent “reemployed” the former strikers, and that it consequently violated Section 8(a)(3) and (1) by subsequently discharging them because of their participation in the strike.¹² In addition, we emphasize that, for nearly 3 months after the strike ended, the Respondent took no action to discharge the strikers, and its conduct evinced a clear intention to continue the employment relationship.

Aside from challenging the judge’s credibility resolutions, the Respondent argues on exceptions that it could not have reemployed the strikers by imposing the lockout on May 5, because it did not yet know that the strike was unlawful. The Respondent also contends that the Union should be estopped from arguing that the lockout constituted reemployment, because the Union hid its failure to file the FMCS notice from the Respondent. The Respondent points out that on May 8 Viar asked Winkle whether he had filed the notice, and Winkle misleadingly replied, “I filed my paperwork.” In support of its estoppel argument, the Respondent cites *ABC Automotive Products Corp.*, 307 NLRB 248, 249 (1992), enfd. mem. 986 F.2d 500 (2d Cir. 1992). We find no merit in the Respondent’s argument.

As found by the judge, the Respondent was not ignorant of the situation on May 5, when it formulated its response to the Union’s unconditional offer to return to work. Viar testified that, on May 5, he “suspected that the strike was illegal and that the [FMCS] notices had not been filed.” He also testified that prior to announcing the lockout Lillie asked him to search the Respondent’s files for a service copy of the FMCS notice

¹¹ The judge observed that Congress could have chosen language other than “reemployed” to indicate a more restrictive intent. For example, it could have chosen words such as “rehire,” “return to work,” or “reinstate.”

¹² In affirming the judge’s findings, we do not reach or rely on his reasoning to the extent it can be read to suggest that when an employer faced with an unlawful strike chooses *any* “response other than immediate termination of the strikers, then the parties resume their employment relationship,” or that an employer cannot reserve its rights in connection with an unlawful strike while at the same time locking the strikers out in support of its bargaining position. Rather, in finding that the Respondent “reemployed” the strikers, we confine our holding to the particular facts of this case. Thus, the dissent’s suggestion that our decision will encourage employers to immediately discharge strikers in this situation rather than investigate further is misplaced.

and, when he was unable to locate the notice, they “knew something . . . was wrong” and they “had a discussion about the potential impact of that 30-day notice not being in the record.”

The Respondent’s reliance on *ABC Automotive*, supra, is misplaced. In *ABC Automotive*, the Board found that the employer waived its right to rely on Section 8(d)(4)’s loss of status provision because it failed to inform the union that its 60-day notice to terminate the parties’ collective-bargaining agreement had been significantly delayed in the mail by the postal service, and it successfully baited the union into striking during the insulated period by refusing to make a wage offer and to provide health and welfare coverage. Here, in contrast, the Respondent accurately surmised that the strike was unlawful on May 5. The judge correctly found, therefore, that the Respondent’s decision to impose a lockout and continue negotiating with the Union for a successor agreement, rather than discharging the strikers, represented a “knowing and reasoned determination,” based on the Respondent’s assessment of its own self-interest. Further, in deciding to impose a lockout on May 5, it is clear that the Respondent did not rely on Winkle’s misleading statement that he had “filed [his] paperwork,” because that conversation did not occur until May 8. In addition, there is no suggestion that the Union baited the Respondent into reemploying the strikers. Finally, the Respondent did not terminate the strikers upon discovering that the notice had not been timely served, but rather it continued to assure the Union that they would be permitted to return to work. It was not discovery of the facts that triggered Respondent’s action, but, apparently, the advice of its new counsel.

The Respondent also argues that the Board rejected the theory that a lockout constitutes reemployment in *Boghosian Raisin*, supra. However, the Respondent’s interpretation of *Boghosian Raisin* is not supported by the facts of that case. In *Boghosian Raisin*, the union offered to end the unlawful strike if the employer agreed to return the strikers to work under the terms and conditions of employment in the parties’ expired contract. Unable to obtain such an agreement, the union continued the strike unabated until the employer discharged the strikers. In contrast, in this case, the Union simultaneously communicated an unconditional offer to return to work and ended the strike by having the strikers present themselves at the plant ready to return to work immediately. Further, the employer in *Boghosian Raisin* never stated that it was locking the strikers out. Rather, it repeatedly advised the union that it was reserving its right to terminate some or all of the strikers, and it never engaged in conduct that would reasonably cause the strikers to be-

lieve that they had been “reemployed.”¹³ Finally, the General Counsel in *Boghosian Raisin* did not allege that the employer “reemployed” the strikers by imposing a lockout. Consequently, the Board did not consider that theory.

The Respondent additionally contends that the judge’s reliance on *Fairprene* and *Shelby* is misplaced because, in those cases, the employer reached an agreement with the union to reemploy the strikers. By contrast, the Respondent points out that the parties here never reached an agreement to return the former strikers to work. In the absence of such an agreement, the Respondent contends that it did not forfeit its right under Section 8(d) to discharge the former strikers.

Our dissenting colleague takes a similar view, arguing that unlawful strikers can be reemployed “only where an employer and a union have entered into an enforceable agreement that restores statutory employee status by requiring the employer to return the strikers to work or otherwise restricting the employer’s authority to discharge them.” He asserts that the former strikers in this case were not “reemployed,” because the Union and the Respondent never entered into such an agreement.

We find no merit in these contentions. It is true that the facts of the instant case differ from those in *Fairprene* and *Shelby*. Nevertheless, *Fairprene* and *Shelby* provide guidance with respect to several key issues. As explained by the judge, *Fairprene* and *Shelby* establish that: (1) an employer faced with an unlawful strike has the discretion to immediately discharge the strikers, to reemploy them, or to take some alternative action; (2) once an employer reemploys illegal strikers (by whatever means), they regain the protections of the Act and the employer cannot thereafter lawfully discharge them for their participation in the strike; and (3) a former striker need not be actively laboring for an employer in order to be “reemployed.”¹⁴ In addition, *Fairprene* establishes that an employer can “reemploy” illegal strikers before it receives confirmation that a strike is illegal.

We think it beyond dispute, moreover, that an employer can “reemploy” workers who lose their status as protected employees, without first reaching an enforce-

¹³ Those facts stand in stark contrast to the Respondent’s conduct in the instant case. As discussed above, after the strike ended, the Respondent, without reserving its rights under Sec. 8(d), imposed a lockout in support of its bargaining position and then continued its longstanding bargaining relationship with the Union by negotiating for a successor agreement, while assuring the Union that the former strikers would be brought back to work once the parties reached agreement on a new contract.

¹⁴ Thus, *Fairprene* clearly undermines the dissent’s reliance on “the common understanding of the term ‘reemployed,’ . . . to describe an actual return to work by locked-out employees.”

able agreement with their union, and even without extending an express offer of reinstatement. Due to the exigencies of its business or in the interest of labor harmony, an employer may unilaterally elect not to discharge such workers and to continue the employment relationship as if it was never broken. That is exactly what the Respondent here did.

In this connection, we note that the Respondent repeatedly referred to the former strikers as “employees” in its communications with the Union. In the May 5 lockout notice, for example, the Respondent acknowledged that the former strikers were “employees” who retained the right to be “expeditiously returned to work” once the lockout was resolved. The Respondent again acknowledged that the former strikers were “employees” in its June 13 letter, assuring the Union that “No matter what decision is made by an employee [regarding voluntarily continuing their union membership and payment of dues] it will not affect the employees’ job at the Company.” In its bargaining proposal presented at the July 25 negotiating session, the Respondent referred to the former strikers as “strikers/locked-out employees.”¹⁵ Additionally, at the May 21 negotiating session, Lillie indicated that he was considering taking action against some of the former strikers because they filed applications for unemployment insurance claiming that they were terminated when, in Lillie’s words, “[t]hey weren’t terminated. We haven’t terminated anybody.”

Moreover, as Lillie divulged to the Union’s attorney at the June 24 negotiating session, Lillie advised the Respondent against discharging the strikers on the basis that it was “too risky.” The Respondent followed Lillie’s advice, electing to impose a lockout and continue the parties’ longstanding collective-bargaining relationship by engaging in negotiations for a new agreement, rather than terminating the strikers. It was not until the Respondent consulted a new law firm, almost 3 months after the strike had ended, that the Respondent decided to discharge the former strikers. By that time, however, the Respondent had already exercised all of the discretion available to it under Section 8(d), by electing to retain,

¹⁵ Our dissenting colleague attempts to minimize the significance of these statements by pointing out that the former strikers remained “employees” within the meaning of the common law and other labor and employment statutes. However, the evidence establishes that the Respondent continued to look upon the former strikers as its statutory employees, in the same relationship to it as before the unlawful strike. The Respondent’s June 13 letter, for example, was predicated on the assumption that the former strikers still had “job[s] at the Company,” to which they would be returning in the foreseeable future.

rather than discharge, the former strikers. Hence, the former strikers were already “reemployed.”¹⁶

Contrary to the Respondent and our dissenting colleague, we do not find it dispositive that the former strikers never actually resumed their labor for the Respondent. Citing a string of cases in which the term “reemployed” was used by unions, employers, and the Board to describe an actual return to work by locked-out employees, our dissenting colleague argues that the former strikers in this case could not have been “reemployed” because they never physically returned to work.¹⁷ However, in the cases cited by our colleague, the Board was not faced with, and therefore had no need to decide, the question presented here of what constitutes “reemploy[ment]” within the meaning of Section 8(d). Even more to the point, it is well settled that a lockout does not sever the employer-employee relationship.¹⁸ Thus, the proposition drawn from the cases cited by our colleague—that locked-out employees are not reemployed until they resume labor for the employer—is simply inconsistent with both the statutory definition of employee and the treatment of locked-out employees under other provisions of the Act. Indeed, a lockout presupposes the existence of an employment relationship between the employer and the employees it has locked out.¹⁹ Persons

¹⁶ The dissent observes that “it is difficult to imagine that the alleged discriminatees would have responded affirmatively if they had been asked, on August 3, ‘Has Douglas Autotech reemployed you yet?’” The former strikers would certainly have been puzzled by that question, but only because the Respondent “reemployed” them by electing not to discharge them and continuing the employment relationship as if they had never lost their status as statutory employees. Hence, from the former strikers’ perspective, they were never unemployed.

¹⁷ *Bud Antle, Inc.*, 347 NLRB 87, 101 (2006), review denied sub nom. *Fresh Fruit & Vegetable Workers Local 1096 v. NLRB*, 539 F.3d 1089 (9th Cir. 2008); *Tidewater Construction Corp.*, 333 NLRB 1264 (2001), vacated 294 F.3d 186 (D.C. Cir. 2002), on remand to 341 NLRB 456 (2004); *Bagel Bakers Council of New York*, 226 NLRB 622, 622 (1976), enfd. 555 F.2d 304 (2d Cir. 1977); *Daisy’s Original’s, Inc.*, 187 NLRB 251, 270 (1970); *Oshkosh Ready-Mix Co.*, 179 NLRB 350, 358 (1969), enfd. 440 F.2d 562 (7th Cir. 1971); *Great Falls Employers Council, Inc.*, 123 NLRB 974, 976–977 (1959); *Triplett Electrical Instrument Co.*, 5 NLRB 835, 849–850 (1938).

¹⁸ Although locked-out employees are not at work because their employer has locked them out, the employment relationship between the employer and the employees continues to exist. See, e.g., *Harter Equipment*, 293 NLRB 647 (1989) (holding that locked-out employees were eligible to vote in a decertification election 7 years after the lock-out began). See also Sec. 2(3) of the statute (“[t]he term ‘employee’ shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute”).

¹⁹ See, e.g., *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (Court refers to locked-out workers as “employees” throughout); *NLRB v. Brown*, 380 U.S. 278 (1965) (same). See also Justice White’s concurring opinion in *American Ship Building*, stating “[a] lockout is the refusal by an employer to furnish available work to his regular employees.” 380 U.S. at 321 (emphasis added).

who are not employed by an employer may no more be locked out by the employer than strike against the employer.²⁰ Thus, persons who are locked out by an employer are viewed as having “permanent employee status.”²¹ In short, the declaration of a lockout makes no sense with respect to persons who are not employees of the employer. By declaring the employees locked out, the Respondent was necessarily, as a matter of Board law, declaring them to be its employees, i.e., it was re-employing them.²²

In sum, we agree with the judge that, when the Respondent locked out the former strikers in support of its bargaining position without reserving its rights under Section 8(d) and repeatedly assured the Union that the then locked-out employees could return to work once the parties reached agreement on a new contract, the former strikers became “individual[s] whose work has ceased as a consequence of, or in connection with, [a] current labor dispute.” Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)). In other words, as found by the judge, they once again became statutory “employees” entitled to the protections of the Act, despite the fact that they were not yet performing labor for the employer. The Respondent therefore violated Section 8(a)(3) by subsequently discharging the entire bargaining unit based on their participation in the strike.²³

²⁰ As the judge pertinently observed in this connection, “When [the Respondent] announced its lockout on May 5, who was being locked out? Obviously, strangers were not being locked out, nor were discharged former employees.”

²¹ *Harter Equipment, Inc.*, 280 NLRB 597, 600 (1986), review denied sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

²² The dissent’s observation that an employer may lock out workers who are not statutory employees—for example, supervisors and agricultural workers, who are outside the coverage of Sec. 2(3)—is beside the point. The workers involved in this case were clearly within Sec. 2(3)’s coverage.

²³ The dissent asserts that our holding undermines the goals of Sec. 8(d) and makes it more likely that unions and employees will resort to unlawful strikes. We emphasize, however, that our decision does not remove the substantial penalty of loss of protected status for employees who strike in violation of the notice requirements. We simply hold that when they are “reemployed” within the meaning of Sec. 8(d)(4), they regain the protection of the Act. We hardly think it is likely that unions or employees will intentionally fail to give notice and risk the termination of all strikers, on the remote chance that the employer not only will not fire the strikers but will lock them out if they make an unconditional offer to return to work, and will do so without an express reservation of rights.

The dissent also contends that our decision may prompt some employers to lawfully discharge illegal strikers immediately, rather than seeking to settle the dispute on terms that would include reemployment. We do not agree. As we have made clear above, our decision is limited to the particular facts of this case. We do not hold that reemployment will occur whenever an employer responds to an unlawful strike with anything other than immediate termination.

Resisting that conclusion, the dissent asserts that the former strikers ceased work as a consequence of the unlawful strike, and not as a consequence of the lockout. However, in refusing the former strikers’ unconditional offer to return to work, the Respondent could have, but did not, rely on their participation in the strike to justify its action. After the employees’ unconditional offer to return to work, their work had no longer ceased as a consequence of the strike, nor had it ceased as a consequence of the Respondent lawfully terminating them under the loss of status provision. Rather, at that time, their work had ceased solely as a consequence of the lockout. They thus clearly fell within the definition of employees in Section 2(3) and therefore, by definition, they had been reemployed within the meaning of Section 8(d). The evidence overwhelmingly establishes that from May 5 until the final bargaining session on July 31, the sole obstacle preventing the former strikers from returning to work was the absence of an agreement on a new labor contract. The statements of the Respondent’s officials in this regard could not have been any clearer. As discussed above, in the May 5 lockout notice, the Respondent stated that the strikers would be “expeditiously returned to work” once the lockout was resolved. At the June 2 negotiating session, Kirk stated, “[W]hen we get a contract . . . you guys come back to work.” At the June 13 session, Lillie stated, “Let me get it straight. . . . [O]nce we get a contract, everybody goes back to

We agree with our colleague that the Act’s policies are served by following its plain language, but we read that language differently. We fail to see, moreover, how allowing the Respondent to discharge the former strikers, 3 months after the unlawful strike had ended and after the Respondent repeatedly assured the former strikers that they could return to work once the parties reached agreement on a new labor contract, would serve those policies. Rather, it would encourage employers faced with an unlawful strike to engage in gamesmanship, while attempting to squeeze every possible advantage out of the situation. We believe this is precisely the result Congress sought to avoid when it provided that the “loss of status” specified in Sec. 8(d)(4) “shall terminate if and when [the unlawful striker] is reemployed.” That language prohibits employers from misleading former strikers into believing that they have been reemployed and then taking disciplinary action for something apparently forgiven. Sec. 8(d)(4) thus reflects a clear public interest in the prompt and peaceful settlement of labor disputes. In contrast, our colleague would permit an employer to keep the fires of discord burning for an indeterminate time, while leading the former strikers down the primrose path toward the bonfire.

For the reasons already stated, we do not believe that our holding in any way lessens the deterrent effect of Sec. 8(d)(4). Nor, as our colleague contends, do we “bemoan” the bargaining leverage an employer might gain as a result of an unlawful strike. When workers strike in violation of the notice requirement, Sec. 8(d)(4) gives an employer unconstrained authority to either terminate or reemploy them. We hold only that when an employer chooses to do the latter rather than the former it cannot later change its mind.

work. . . . That's our goal. That's our goal. Once we get a contract, everybody goes back to work." At the July 2 session, Kirk stated, "We have formulated a transition plan, and we have meetings—weekly meetings and sometimes every other day with [the temporary replacement] employees. They know, when we get a contract and . . . you guys come back to work, they go out." In light of these statements, it is impossible to conclude that the former strikers' absence from work was a consequence of anything other than the parties' "current labor dispute" over terms and conditions of employment.

4. Cross-exceptions

The Acting General Counsel cross-excepts to the judge's failure to additionally find that those employees on layoff or approved leave from May 1 to 5 did not engage in a strike within the meaning of Section 8(d) and thus did not lose their protected status. The Acting General Counsel also cross-excepts to the judge's finding in section II,B, of his decision that "had the Employer discharged the bargaining unit members during the duration of the ongoing strike from May 1 to May 5, there would be no legal basis to challenge that decision," to the extent that the judge's use of the term "bargaining unit members" includes employees on layoff or approved leave at the time of the strike.

We find merit in the Acting General Counsel's cross-exceptions, which are unopposed. Engaging in a strike within the meaning of Section 8(d) requires "a volitional act by the employee (deliberately withholding labor) sufficient to make the employee complicit in the unlawful strike." *Freeman Decorating Co.*, 336 NLRB 1, 6 (2001), enf. denied sub nom. *Stage Employees IATSE Local 39 v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003).²⁴

²⁴ Although the court denied enforcement of the Board's Order in *Freeman Decorating*, supra, the court's reasoning in that case does not affect the result here. *Freeman* involved an illegal strike by a union against several employers with which the union had an exclusive hiring hall agreement. The union refused to refer its hiring hall registrants to the struck employers for a 3-week period. The Board found that the registrants did not "engage in a strike" because, although they did not work for any of the struck employers during the period of the strike, there was no evidence that they deliberately withheld their labor. The court found that the Board's conclusion "set a standard that could never be met in the hiring hall context." 334 F.3d at 35 (emphasis added). The court reasoned that, under the contract between the union and the employers, the union controlled the referral process and the individual registrants were unable to contact the employers directly to seek work. Therefore, in the court's view, it would have been impossible for the employers to prove that the individual registrants had deliberately withheld their services. Those facts are not present here.

In finding that the hiring hall registrants had "engage[d] in a strike," the court also distinguished Board decisions holding that an employer may not infer strike support when an employee is absent from work for other plausible reasons. The court reasoned that those cases involved

Therefore, an employee legitimately absent from work during a strike cannot be presumed to have joined the strike on the basis of his absence. See, e.g., *Park Manor Nursing Home*, 312 NLRB 763, 766–767 (1993) (employer unlawfully discharged employee on authorized vacation leave during a strike); *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 2 (1990), enf. mem. 986 F.2d 1422 (6th Cir. 1993) (employer unlawfully discharged employee for being on picket line while on maternity leave); *Trumbull Memorial Hospital*, 288 NLRB 1429, 1430 (1988) (employer unlawfully discharged employees on sick leave or vacation leave during a strike).

In the instant case, it is undisputed that 33 employees were on layoff or leave status and were not scheduled to report to work during the strike.²⁵ Because they did not withhold their labor during the strike, these 33 employees never lost the protection of the Act. Accordingly, wholly apart from our finding that the Respondent unlawfully discharged unit members who participated in the strike, we find that the Respondent violated Section 8(a)(3) and (1) by discharging employees who did not participate in the strike, solely on the basis of their union representation.

B. The Alleged 8(a)(5) Refusal to Bargain and Withdrawal of Recognition

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to meet with the Union in order to bargain about terms and conditions of employment for the unit members on August 14, and at all times thereafter. On exceptions, the Respondent argues that it had no obligation to bargain with the Union after August 4 because the Union lost its majority status as a result of the discharges.

lawful strikes, while the strike in *Freeman* was unlawful. See 334 F.3d at 35–36. The strike in the present case was also unlawful. As explained above, however, *Freeman* is distinguishable. Furthermore, it would defy logic here to presume that employees on layoff status and authorized leave ratified the illegal strike simply because they did not affirmatively disavow it. The strike was very short, not even the employees actually engaged in the strike were aware that it was illegal, and the strike immediately ended once they became aware of that fact. The same day, the Respondent reemployed the strikers by announcing that it was locking them out and that they would be allowed to return to work once the parties reached agreement on the terms of a new labor contract. In these circumstances, we cannot assume that the employees who were on layoff status or authorized leave for the entire duration of the strike were complicit in the illegal strike.

²⁵ As discussed above, the parties dispute the status of employee Becky Vickers. The Acting General Counsel contends that Vickers was on authorized sick leave, while the Respondent contends she was on active status. The record is not sufficient to resolve this issue. As stated by the judge, Vickers's status can be determined during compliance.

Having affirmed the judge's finding that the discharges were unlawful, we also affirm his finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union. We observe that we would find the refusal to bargain unlawful even if we were to accept (which we do not) the Respondent's contention that it was privileged to discharge the unit members who participated in the strike. In that event, the unit would have comprised the approximately 33 members who were on layoff or authorized leave status during the strike.²⁶

The judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. The Union has excepted to the dismissal, arguing that the Respondent's refusal to meet and bargain on and after August 14 regarding the terms and conditions of employment of the unit employees was tantamount to a blanket withdrawal of recognition. We find no merit in the exception. The Respondent has continued to respond to the Union's information requests and it has offered to bargain over the effects of the discharges. Accordingly, we agree that the evidence is insufficient to support a finding that the Respondent intended to completely sever its relationship with the Union by withdrawing recognition.

III. REMEDIAL MATTERS

The judge recommended that the Respondent be ordered to reinstate the discriminatees to their former jobs, make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them from the date of discharge, and bargain with the Union on request. He further recommended a broad cease-and-desist order, citing, among other things, the "egregious nature and sweeping extent of the Company's unfair labor practices" and "the likely persistence of ingrained opposition to the purposes of the Act due to the continuing tenure of the key management officials."²⁷

²⁶ It is well established that temporary employees working during a lockout are not a part of the bargaining unit. *Harter Equipment*, supra, 293 NLRB at 648.

²⁷ On February 9, 2011, after the judge issued his decision, the United States District Court for the Western District of Michigan issued a temporary injunction under Sec. 10(j) of the Act, ordering the Respondent to cease and desist from discriminatorily discharging employees and from refusing to bargain with the Union. *Glasser v. Douglas Autotech Corp.*, 781 F. Supp.2d 546 (W.D. Mich. 2011). The court denied the Acting General Counsel's request that the injunction require the interim reinstatement of the alleged discriminatees, concluding that "injunctive relief reinstating the parties to the lockout status that preceded the mass termination is just and proper." We note that the 10(j) proceeding was a preliminary proceeding only. The Board retains broad discretionary authority to fashion an appropriate remedy, see *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969), and the remedy we impose below is not inconsistent with the interim relief ordered by the court.

A. The Remedy for the 8(a)(3) Discharges

The Respondent has excepted to the remedy. The Respondent argues that even if the discharges were unlawful the discriminatees would be entitled only to be returned to the status quo ante immediately prior to those discharges. The Respondent points out that in the instant matter the status quo ante was a lawful lockout, and it contends that the lockout would have continued indefinitely. The Respondent accordingly asserts that the reinstatement and backpay remedy would place the discriminatees in a far better position than they would have enjoyed in the absence of any unlawful conduct.

We are mindful that the status quo immediately preceding the unlawful discharges was a lockout. We also recognize that the parties remained far apart on a number of key issues at the time of the discharges, and it is uncertain whether, or when, the parties would have reached agreement on the terms of a new contract or bargained to a good-faith impasse ending the lockout. We are additionally cognizant that the Board's remedy is to be tailored to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). There is no provision in the Act for punitive remedies. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Therefore, in determining whether the discriminatees in the instant case are entitled to reinstatement and backpay, our starting point is the settled principle that the remedy "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 902-904 (1984) (emphasis in original).

Given the existence of the lockout and the status of negotiations at the time of the discharges, we are persuaded that an unqualified reinstatement and backpay order is not sufficiently "adapted to the [specific] situation which calls for redress"²⁸ and could result in a windfall that bears no reasonable relationship to the injury sustained. On the other hand, an order reinstating the discriminatees to the status of locked-out employees, and awarding no backpay, would ignore the unwholesome effects of the Respondent's unfair labor practices on the parties' collective bargaining. The Respondent was obligated to continue negotiating with the Union until the parties reached agreement or a good-faith impasse on the terms of a new labor contract. There can be no question that the Respondent's unlawful discharge of the entire bargaining unit and its unlawful refusal to continue nego-

²⁸ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).

tiating over contract terms with the Union impaired the parties' collective bargaining. The Respondent's conduct diverted the bargaining process from negotiations on substantive issues separating the parties to a narrow focus on the consequences of the Respondent's termination of the employees. The parties' negotiations since August 4 have thus been limited to the effects of the unlawful discharges. In these circumstances, we cannot determine whether, or when, the lockout would have ended and the unit employees would have returned to work in the absence of the Respondent's unlawful conduct.

We are also unable to determine not only when, but under what terms and conditions of employment bargaining unit members would have returned to work, if at all. Given the Respondent's successful operation using temporary replacement workers and the state of negotiations prior to the unlawful discharges, the Union eventually may have been forced to modify its demands and return its members to work on less favorable terms than those set forth in the expired collective-bargaining agreement. Indeed, the Union's proposal at the parties' final negotiating session on July 31 reflects that the Union was prepared to accept concessions in a number of areas. Although those concessions offered by the Union were not sufficient to persuade the Respondent to end the lockout, had the Respondent not perceived its hand in negotiations to be strengthened by the threat of discharging the entire bargaining unit, it may have been more willing to compromise.

Under these circumstances, to assume that the lockout would have persisted indefinitely had the Respondent continued to bargain in good faith and not discharged the entire bargaining unit is unreasonable. Moreover, it would reward the Respondent for the uncertainty caused by its own unlawful conduct. As the Supreme Court has observed, the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). See also *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973) (applying the well-established remedial principle that "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved."); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938) (it appropriately "rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune."), cert. denied 304 U.S. 576 (1938). Consistent with the above principles, we find that the Respondent should

bear the burden of producing affirmative evidence as to whether the lockout would have persisted and the terms and conditions on which the employees would have returned to work (if at all).

Ordering the Board's traditional remedy of reinstatement and backpay, while permitting the Respondent to demonstrate in a compliance hearing that, in the absence of its unfair labor practices, the lockout would have persisted or the Respondent would have, at some identifiable time, lawfully imposed, as a result of agreement or impasse, less favorable terms than those under the expired collective-bargaining agreement will "strike a better balance between two principles that guide the Board's remedial discretion: placing the burden of uncertainty on the wrongdoer and avoiding a remedy that is, in fact, punitive." *Planned Building Services*, 347 NLRB 670, 675 (2006) (placing burden on respondent employer in successorship-avoidance case to demonstrate, in compliance proceeding, that it would not have agreed to monetary provisions of predecessor's collective-bargaining agreement). See also *Abilities & Goodwill*, 241 NLRB 27, 28 fn. 5 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979) (Board resolves uncertainty against wrongdoer and presumes that unlawfully discharged strikers would have returned to work, but the respondent may introduce evidence to the contrary at a compliance hearing).

In sum, we will issue an order consistent with our traditional remedy in unlawful discharge cases. But we will permit the Respondent to introduce evidence in a compliance proceeding establishing that, in the absence of its unfair labor practices, the lockout would have persisted; or establishing the date on which the parties would have bargained to an agreement ending the lockout and the terms of the agreement that would have been negotiated; or establishing the date on which the Respondent would have bargained to good-faith impasse and implemented its own proposals, and the terms that it would have implemented. If the Respondent carries its burden of proof on any of these points, its reinstatement and/or make-whole obligations shall be adjusted accordingly. See generally *Planned Building Services*, supra. See also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (recognizing that compliance proceedings provide the appropriate forum for tailoring the remedy to suit the individual circumstances of a discriminatory discharge).

B. The Recommended Broad Order

Although not sought by the Acting General Counsel, the judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." A broad order is appropriate when a respondent has been shown either to

“have a proclivity to violate the Act” or to have “engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

We decline to impose a broad order here. First, the Respondent has not been shown to have a proclivity to violate the Act. The parties’ bargaining relationship spans nearly 70 years and was amicable up until the events at issue here. The Respondent does not have a prior history of violating the Act, and there is no evidence suggesting that it would do so outside the unusual circumstances of this case. Second, the Respondent’s misconduct, although serious, does not demonstrate a general disregard for its employees’ Section 7 rights.²⁹ Rather, in this case, the Respondent received and chose to follow what ultimately turned out to be incorrect legal advice. Accordingly, we are issuing a narrow order requiring the Respondent to cease and desist from violating the Act “in any like or related manner.”³⁰

C. The Union’s Request for Litigation Expenses

In addition to the remedies provided in the judge’s recommended Order, the Union requests an award of litigation expenses. Although the Respondent’s unfair labor practices were serious, this case does not present the sort of “truly frivolous litigation” that warrants such an “extraordinary” remedy. *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995), enf. denied sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). This case involves unusual and unsettled legal issues. We therefore find that an award of litigation expenses is not warranted. See, e.g., *Cogburn Healthcare Center*, 335 NLRB 1397, 1402 (2001), enf. denied in part 437 F.3d 1266 (D.C. Cir. 2006); *Waterbury Hotel Management LLC*, 333 NLRB 482 fn. 4 (2001) (denying costs where “[t]he Respondent’s defenses, although generally meritless, were debatable rather than frivolous”), enf. 314 F.3d 645 (D.C. Cir. 2003).

²⁹ We do not rely on the judge’s characterizations of the Respondent’s conduct and the conduct of management officials during the trial.

³⁰ Chairman Pearce would impose a broad order. A broad order is warranted in Chairman Pearce’s view, in light of the egregious nature and sweeping impact of the Respondent’s unfair labor practices and the continuity in the management of the Company. As noted by the judge, the mere fact that the Respondent has no prior history of violating the Act does not, in and of itself, undermine the necessity for a broad order. See *Five Star Mfg., Inc.*, 348 NLRB 1301, 1302–1303 (2006), enf. 278 Fed. Appx. 697 (table); *Trailmobile Trailer, LLC*, 343 NLRB 95 fn. 2 (2004); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 285–286 (D.C. Cir. 1981) (“[T]hat the Company has no prior record of NLRB violations does not, in itself, dissipate the egregiousness of the conduct involved in this proceeding.”), enf. in pertinent part 245 NLRB 630 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Douglas Autotech Corporation, Bronson, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

“(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the following for paragraph 2(d).

“(d) Make all of the unlawfully discharged bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.”

3. Substitute the following for paragraph 2(f).

“(f) Within 14 days after service by the Region, post at its facility in Bronson, Michigan, copies of the attached notice marked “Appendix.”⁶² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2008.”

Dated, Washington, D.C. November 18, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

I dissent from the majority's finding that the Respondent "reemployed" the illegal strikers within the meaning of Section 8(d)(4) of the Act when, in response to their unconditional offer to return to work, the Respondent *deprived them of work* by instituting a lawful lockout. Further, and contrary to the majority, the lockout was not somehow transformed into an affirmative act of "reemploy[ment]" by either the Respondent's occasional references to the illegal strikers as "employees" or its stated intention to return them to work if and when the parties agreed to a successor collective-bargaining agreement. In this case, the majority contorts the term "reemployed" and thereby undermines Section 8(d)'s goals of encouraging mediation and discouraging reflexive strikes and their attendant disruptions of commerce.

Consistent with Board precedent, I would find that illegal strikers are "reemployed" only on an actual return to work or on their acceptance of an employer's express offer of reinstatement, such as often occurs in a strike settlement agreement. Because neither condition was satisfied here, I would find that the illegal strikers never regained the Act's protection and that the Respondent did not violate Section 8(a)(3) or (1) by discharging them.¹

A. Statutory Background

Under Section 8(d), a union may not engage in an economic strike unless it first provides 60 days' written notice to the employer of its intent to modify or terminate an existing collective-bargaining agreement and 30 days' notice to the Federal Mediation and Conciliation Service (FMCS) as well as any relevant State mediation agency. Those notice requirements were enacted to ensure that bargaining and mediation can proceed for a reasonable time free from direct economic pressures. *Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *affd.* sub nom. *Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964). "[T]he whole thrust of the section is to give the [FMCS] sufficient time to intervene in an effective manner in advance of a stoppage of work rather than after it has occurred, should the [FMCS] deem intervention nec-

essary or desirable." *Retail Clerks Local 219 v. NLRB*, 265 F.2d 814, 818 (D.C. Cir. 1959).

It is unlawful for a union to engage in an economic strike during either of the 8(d) notice periods. See, e.g., *Teamsters Local 572 (Dar San Commissary)*, 223 NLRB 1003 (1976). Moreover, the Act imposes a severe penalty on employees who participate in such an illegal strike. Under Section 8(d)(4), "[a]ny employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute . . . but such loss of status for such employee shall terminate if and when he is reemployed by such employer." By stripping illegal strikers of their employee status, "the loss-of-status provision, in effect, places an obligation upon employees" to ensure that the notice periods are honored. *Fort Smith Chair Co.*, 143 NLRB at 518.

Since the Union failed to provide 30 days' notice to the FMCS as required by Section 8(d)(3), the May 1, 2008 strike was unlawful, and its participants lost the Act's protection. The majority finds that the Respondent "reemployed" the illegal strikers, interpreting that statutory term to encompass the imposition of a lockout, at least where an employer occasionally refers to the workers as "employees" and indicates that it plans to return them to work if and when the parties execute a new collective-bargaining agreement. The majority's interpretation of Section 8(d)(4) is untenable.

B. Plain Meaning of the Term "Reemployed"

The majority's interpretation ignores the common understanding of the term "reemployed," which has been used repeatedly by unions, employers, and the Board to describe an actual return to work by locked-out employees.² Particularly instructive is *Tidewater Construction*

¹ I concur with the majority's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging the 33 employees who, during the entire duration of the illegal strike, were on layoff status or authorized leave and did not withhold their labor from the Respondent. I infer that those discharges were unlawfully motivated from the pretextual nature of the Respondent's proffered justification. The Respondent claims to have discharged the 33 inactive employees (along with the others) because of their participation in the illegal strike. However, the Respondent had absolutely no basis for assuming that they had participated. Additionally, I concur with the majority's findings that the Respondent violated Sec. 8(a)(5) and (1) by refusing to meet and bargain over a successor collective-bargaining agreement but it did not unlawfully withdraw recognition. Finally, I join Member Becker in finding that a broad cease-and-desist order is not warranted in this case.

² See, e.g., *Bud Antle, Inc.*, 347 NLRB 87, 101 (2006) (employer's letter ending lengthy lockout informed employees that they "w[ould] be required to spend the first 20 days of their reemployment" in orientation and training), review denied sub nom. *Fresh Fruit & Vegetable Workers Local 1096 v. NLRB*, 539 F.3d 1089 (9th Cir. 2008); *Bagel Bakers Council of New York*, 226 NLRB 622, 622 (1976) (union's letter applying for reinstatement on behalf of locked-out employees requested that employer "[p]lease . . . make all necessary arrangements for the commencement of their reemployment"), *enfd.* 555 F.2d 304 (2d Cir. 1977); *Daisy's Original's, Inc.*, 187 NLRB 251, 270 (1970) (no-lockout clause provided that "[s]hould a lockout occur, the Employer's sole obligation shall be . . . to terminate the lockout and to reemploy the employees"); *Oshkosh Ready-Mix Co.*, 179 NLRB 350, 358 (1969) ("reemployment [of locked out employees] can be obtained only by concession to the employer's terms"), *enfd.* 440 F.2d 562 (7th Cir. 1971); *Great Falls Employers Council, Inc.*, 123 NLRB 974, 976-977 (1959) (employer violated Section 8(a)(3) by "partial[ly] reemploy[ing]" locked-out employees on a sporadic basis to prevent them from securing State unemployment compensation benefits); *Triplett Electrical Instrument Co.*, 5 NLRB 835, 849-850 (1938) (describing locked-out worker as being "reemployed" when he returned to work).

Corp., 333 NLRB 1264 (2001), vacated 294 F.3d 186 (D.C. Cir. 2002), on remand 341 NLRB 456 (2004).³ In that case, a union ended a lawful economic strike and unconditionally offered for strikers to return to work. In response, the employer instituted a lockout in support of its bargaining position. In a letter to the union, the employer stated that “it was unwilling to *reemploy* [the locked-out unit employees] without first having reached agreement on a collective bargaining agreement.” *Id.* at 1264 (emphasis added). Thus, “reemployed” was used here to describe an actual return to work by the locked-out employees. The Board used the term in precisely the same sense, stating that “[a]cceptance of the Respondent’s bargaining proposals by the Union . . . stood as the lone obstacle to their reemployment.” *Id.*

In contrast, I am aware of no authority in which the term “reemployed” has been used, as by the majority today, to describe an employer’s imposition of a lockout. The majority cites none. That is likely the case because a lockout is commonly understood as a *deprivation* of employment. “As used by the Board and the courts, . . . a lockout is most simply and completely defined as the *withholding of employment* by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them.” 2 *The Developing Labor Law* 1639–1640 (John E. Higgins, Jr. et al. eds., 5th ed. 2006) (emphasis added), quoted in *Brady v. National Football League*, 644 F.3d 661, 674 (8th Cir. 2011); see also *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 664 (6th Cir. 2005) (same); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 307 (1965) (describing a lockout as a form of “temporary separation from employment”); *Schenk Packing Co.*, 301 NLRB 487, 490 (1991) (describing locked-out workers as being “deprived of their employment”). Thus, a lockout is the antithesis of reemployment.⁴ Given the contrasting con-

cepts, it strains credulity that Congress envisioned a lockout as an affirmative act of “reemploy[ment]” within the meaning of Section 8(d)(4).⁵

The majority relies on *Fairprene Industrial Products*, 292 NLRB 797 (1989), *enfd. mem.* 880 F.2d 1318 (2d Cir. 1989), to support its strained interpretation. That case is easily distinguishable, as it did not involve a lockout. In *Fairprene*, a union engaged in an economic strike without first providing 30 days’ notice to the FMCS, as required by Section 8(d)(3). Consequently, the strike was unlawful, and the illegal strikers lost the Act’s protection. The union and the employer then entered into a full strike settlement agreement in which the employer “*promis[ed]* no reprisals and *agree[d]* to reinstate all strikers.” *Id.* at 803 (emphasis added). Shortly after entering into the strike settlement agreement, the employer scheduled the strikers to return to work. However, before they actually returned, the employer confirmed that the strike had been unlawful and discharged the participants. According to the judge, whose decision was adopted by the Board, “when the full strike settlement agreement was reached and the Company scheduled the employees to return to work, the strike ended and the strikers were ‘reemployed’ within the meaning of [Section 8(d)(4)].” *Id.*

The majority cites *Fairprene* to support its proposition that “a former striker need not be actively laboring for an employer in order to be ‘reemployed.’” That proposition is true, but only where an employer and a union have entered into an enforceable agreement that restores statutory employee status by requiring the employer to return the strikers to work or otherwise restricting the employer’s authority to discharge them. Here, unlike in *Fairprene*, the Respondent and the Union never entered into such an agreement. The Respondent merely stated its intention to return the illegal strikers (who were then locked out) to work if and when the parties reached a successor collective-bargaining agreement.⁶

The majority deems this body of precedent to be irrelevant because the cases involve use of the term “reemployed” outside the context of Sec. 8(d)(4). That is a mistake. The cited precedent reflects the common understanding of the word “reemployed,” and “Congress may well be supposed to have used language in accordance with the common understanding.” *U.S. v. Wurts*, 303 U.S. 414, 417 (1938) (quoting *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343, 347 (1875)); see also *Hamilton v. Lanning*, 130 S.Ct. 2464, 2471 (2010) (“When terms used in a statute are undefined, we give them their ordinary meaning.”) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

³ I cite *Tidewater Construction* as evidence of the common use of the term “reemploy” in the context of a lockout and not for its analysis of the 8(a)(3) allegation there before the Board.

⁴ While these decisions make clear that a lockout is commonly and properly understood as a temporary deprivation of employment, a lockout does not sever the employment relationship or affect a worker’s status as a statutory employee. See, e.g., *Harter Equipment, Inc.*, 280 NLRB 597, 600 (1986), review denied sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). The majority errs in

reasoning that, because a lockout does not sever the employment relationship, it must constitute an affirmative act of “reemploy[ment].”

⁵ The majority asserts that “a lockout makes no sense with respect to persons who are not [statutory] employees of the employer.” However, an employer may lock out workers who are not statutory employees, such as statutory supervisors, agricultural workers, or other individuals not within Sec. 2(3)’s coverage. Thus, the majority errs in finding that, “[b]y declaring the employees locked out, the Respondent was necessarily, as a matter of Board law, declaring them to be its [statutory] employees.”

⁶ Contrary to the majority, *Fairprene* does not undermine my reliance on the body of precedent, cited above, in which employees who had not actually returned to work were described as not yet “reemployed.” *Fairprene* represents a nuance that is consistent with common sense. One can easily envision an employee describing himself as “reemployed” after he (or his union) has accepted an offer of reem-

The majority's suggestion that the Respondent's unilateral statements of its conditional intent support a finding of "reemploy[ment]" is wholly unpersuasive. An employer does not "reemploy" illegal strikers by communicating a conditional plan to permit them to return to work any more than a company "employs" an applicant by informing him that it intends to hire him if and when an opening becomes available. In short, the Respondent's unilateral statement of intention was not an offer of reemployment. Nor, of course, was there any acceptance by the Union. Because there was no agreement to reinstate the illegal strikers and because they never actually returned to work, they were not "reemployed" within the meaning of the Act.⁷

Contrary to the majority, its result is not supported by the Respondent's occasional post-strike references to the illegal strikers as "employees." Just as the Board does not consider a job title determinative when deciding whether an individual is a statutory employee or statutory supervisor, *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761 (1974), calling a worker an "employee" is not an act of reemployment under the Act. Nor does use of that label somehow transform the lockout's deprivation of work into an affirmative act of reemployment. Further, I note that the loss-of-status provision operated to strip the illegal strikers of their status as employees *under the Act only*. They remained "employees" within the meaning of the common law and other labor and em-

ployment. In contrast, it is difficult to imagine that the alleged discriminatees would have responded affirmatively if they had been asked, on August 3, "Has Douglas Autotech reemployed you yet?"

⁷ The majority also relies on *Shelby County Health Corp. v. State, County & Municipal Employees Local 1733*, 967 F.2d 1091 (6th Cir. 1992), which involved facts very similar to *Fairprene* and is likewise distinguishable on the ground that it did not involve a lockout, but rather an enforceable settlement agreement restricting the employer's right to discharge strikers. *Shelby County* was not an unfair labor practice proceeding and did not originate with the Board. Rather, an employer brought an action in Federal district court seeking to vacate an arbitration award that required reinstatement of an illegal striker pursuant to a strike settlement agreement. The employer argued that the award was contrary to a purported public policy embodied in Sec. 8(d)(4) mandating the discharge of illegal strikers. The court of appeals rejected the employer's argument, reasoning that Sec. 8(d) does not *mandate* discharge, but rather leaves an employer with discretion over the matter. The court explained that the employer had voluntarily "bargained away" its unfettered discretion to discharge the illegal strikers and therefore the arbitration award was entirely consistent with the public policy embodied in Sec. 8(d)(4). The court did not hold that the illegal strikers had been "reemployed" and regained the Act's protection. It did state, when describing the statutory background, that "once the employer decides not to discharge the employee, that employee is once again brought under the protective mantle of the NLRA." *Id.* at 1096. That comment is dictum, and, in any event, not applicable to this case where the Respondent never decided not to discharge the illegal strikers.

ployment statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 203(e)(1). Thus, referring to the illegal strikers as "employees" was not inaccurate or inconsistent with the fact that they remained unprotected by the Act. Simply put, the majority reads far too much into the Respondent's use of a common label. The most that can be taken from it is that the illegal strikers had not yet been discharged.⁸

The majority also mistakenly concludes the definition of "employee" in Section 2(3) supports its finding that the lockout was an affirmative act of "reemploy[ment]." Section 2(3) provides that:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.

According to the majority, the illegal strikers "became" individuals "whose work has ceased as a consequence of, or in connection with, [a] current labor dispute" when the Respondent announced the lockout on May 5. From that premise, the majority concludes that the illegal strikers must have been "reemployed" within the meaning of Section 8(d)(4). That reasoning is flawed. The work of the illegal strikers "ceased" on May 1, when the strike started.⁹ At that point, by express statutory definition, they lost their status as employees of the employer engaged in the particular labor dispute. They never resumed their work for that employer. Hence, contrary to the majority's assertion, the strikers' work could not and did not "cease" on May 5 when the Respondent commenced the lockout in continuation of the particular labor dispute. They *remained* out of work on that date, to be sure. But the point at which their

⁸ Contrary to the majority, the evidence does not "[establish] that the Respondent continued to look upon the former strikers as its *statutory* employees, in the same relationship to it as before the unlawful strike." (Emphasis added.) To support that assertion, the majority cites a June 13 letter in which the Respondent notified the Union that because their agreement had expired it would no longer enforce the expired agreement's union-security and dues-checkoff provisions. The Respondent added that it did not object to employees voluntarily remaining union members or paying dues and that "[n]o matter what decision is made by an employee, it will not [a]ffect the [employee's] job at the Company." The letter's reference to an "employee's job" does not demonstrate that the Respondent viewed the illegal strikers as having regained statutory employee status. It merely reveals that they had not yet been terminated.

⁹ "Cease" means "To put an end to; discontinue To come to an end; stop To stop performing an activity or action; desist." *The American Heritage Dictionary* 298 (4th ed. 2000).

work ceased or stopped was on May 1. Consequently, the majority's reliance on Section 2(3) is misplaced.

C. The Majority's Interpretation Undermines the Act's Policies

As explained by the Supreme Court, Section 8(d)'s loss-of-status provision must be interpreted in light of the "dual purpose" of the Act: "(1) to protect the right of employees to be free to take concerted action as provided in ss 7 and 8(a), and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work, and employment conditions."¹⁰ "A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it."¹¹ The majority's interpretation, which runs counter to its plain language, of Section 8(d)(4) does not protect Section 7 activity. The illegal strikers here engaged in none. Their participation in the illegal strike was unprotected conduct—conduct that Congress sought to strongly deter by enacting the loss-of-status provision.

Second, the majority's interpretation does not facilitate substitution of collective bargaining for economic warfare. If anything, by minimizing the requirements to regain the Act's protection, the majority makes it more likely that unions and employees will resort to reflexive strikes in violation of Sections 8(d) and 8(b)(3). *Stage Employees v. NLRB*, 334 F.3d 27, 36 (D.C. Cir. 2003) ("removing the statutorily prescribed consequences of unlawful behavior" serves to "[turn] Section 8(d) on its head").

Indeed, the majority's ruling might also prompt some employers to lawfully discharge illegal strikers immediately on their request to return to work instead of locking them out and negotiating to settle the labor dispute on terms that would include reemployment. In what might be an attempt to avoid fostering that absurd result, the majority hints that, in its view, a lockout might not constitute an act of reemployment if the employer simultaneously announces that it is reserving its right to discharge the illegal strikers. Imposing that affirmative burden on an employer in response to unprotected strike activity only underscores how far my colleagues stray from the clear meaning and intent of Section 8(d)(4).

The majority questions "how allowing the Respondent to discharge the former strikers in this case would serve any of the underlying purposes or policies of the Act." The Act's purposes and policies are well served when the

Board gives effect to the Act's plain language. Section 8(d)(4) clearly strips illegal strikers of the Act's protection and permits their lawful discharge until they have been "reemployed." As explained above, the illegal strikers were never "reemployed" because they never actually returned to work or accepted an express offer of reinstatement. Thus, finding that the discharges were lawful would effectuate the policy underlying Section 8(d)(4) as well as the Act's broader policies of discouraging impulsive strikes and their disruptions of commerce.

The majority bemoans the bargaining leverage that an employer might gain from its employees' having lost their statutory protections by participating in an illegal strike. However, any such leverage is a directly attributable to the consequence that Congress prescribed in Section 8(d)(4). In attempting to avoid a result it finds undesirable, the majority stretches that provision's language beyond its limit.

In sum, the language of Section 8(d)(4) and the policies underlying it compel a finding that the illegal strikers in this case were not "reemployed" and did not regain the Act's protection. Consequently, I would dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging them.¹²

Dated, Washington, D.C. November 18, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

¹⁰ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956) (holding that Sec. 8(d)'s notice periods do not apply to unfair labor practice strikes).

¹¹ *NLRB v. Lion Oil Co.*, 352 U.S. 282, 289 (1957) (holding that Sec. 8(d) permits a midterm economic strike where the agreement provides for negotiation and adoption of modifications at an intermediate date and the union furnishes the relevant 8(d) notices).

¹² Because I would find that the Respondent lawfully discharged the illegal strikers, I do not pass on the appropriateness of any remedy for those discharges. As to the unlawful discharges of the 33 employees who were on layoff status or authorized leave, I would leave to compliance the determination of the appropriate remedy, if any, for those individuals, applying traditional remedial principles and burdens of proof.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for maintaining membership in, or engaging in activities in support of, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and its Local 822 or any other union.

WE WILL NOT, on request, fail or refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and its Local 822 as the exclusive bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment:

All employees employed at our Bronson, Michigan plant; but excluding superintendents, foremen, assistant foremen, time study men, timekeepers, plant protection employees, stock and service manager, receiving room foremen, first aid nurse, administrative office employees, clerical or secretarial assistants, payroll clerks, and all other guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL rescind the August 4, 2008 unlawful discharges of all bargaining unit employees and WE WILL, within 14 days from the date of the Board's Order, remove any reference to the unlawful discharges from our files and records, and WE WILL, within 3 days thereafter, notify each of these employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the bargaining unit members unlawfully discharged on August 4, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make all of the bargaining unit employees whole for any loss of earnings and other benefits result-

ing from their unlawful discharge on August 4, 2008, less any net interim earnings, plus interest.

DOUGLAS AUTOTECH CORPORATION

Steven E. Carlson, Esq., for the General Counsel.

Jeffrey J. Fraser, Esq., *Kimberly Richardson, Esq.*, and *Kelley E. Stoppels, Esq.*, of Grand Rapids, Michigan, for the Respondent.

Samuel C. McKnight, Esq., of Southfield, Michigan, and *Maneesh Sharma, Esq.*, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on June 24–25 and August 17–19, 2009. The original charge was filed August 6, 2008,¹ and an amended charge was filed September 18. The complaint was issued February 25, 2009.

The complaint alleges that the Employer, Douglas Autotech Corporation, discharged all of the bargaining unit members from their employment because of their participation in union activities and in order to discourage employees from engaging in such activities. The complaint further alleges that the Employer withdrew recognition from Local 822, the exclusive representative of its bargaining unit employees, and has since refused to meet and bargain collectively with that representative. These actions are asserted to have violated Section 8(a)(1), (3), and (5) of the Act. The Employer's answer to the complaint denied the material allegations of wrongdoing.²

For reasons set forth in detail in this decision, I find that the Employer did unlawfully and discriminatorily discharge and refuse to further employ the members of the bargaining unit. I also find that the Employer unlawfully failed and refused to bargain with the Union regarding the terms and conditions of employment of the bargaining unit members. As a consequence, I conclude that the Employer has violated the Act in the manner alleged in these portions of the complaint. I further conclude that the General Counsel failed to meet its burden of proving that the Employer withdrew recognition from the Union as the exclusive representative of the bargaining unit employees in violation of the Act. Therefore, I recommend that this allegation of the complaint be dismissed.

Before proceeding to the merits of this controversy, it is necessary to address one unresolved procedural matter. Throughout the course of this litigation, the parties expended considerable energy in both prosecuting and defending against efforts to obtain evidence through the Board's subpoena process. Commendably, the lawyers were able to resolve many of the conflicts. Other issues were addressed by rulings that I made dur-

¹ All dates are in 2008, unless otherwise indicated.

² The Employer also filed a Motion for Summary Judgment. (GC Exh. 1(r).) The Board denied this motion by an order dated June 22, 2009. (GC Exh. 1(u).)

ing the course of the trial.³ However, despite my issuance of a ruling on the matter, one topic remains to be resolved and requires some discussion.

In response to subpoenas served on the Employer by both the General Counsel and the Charging Party, counsel for the Respondent has represented that he has provided all of the items sought with the exception of certain specific items that he deemed to be covered by one or more privileges. In connection with these claims of privilege, counsel submitted a privilege log.⁴ The opposing parties demanded that the documents listed on that log be subject to my *in camera* inspection. The Board has authorized its administrative law judges to conduct such inspections in appropriate circumstances. See *Brinks, Inc.*, 281 NLRB 468 (1986), and *CNN America, Inc.*, 352 NLRB 448 (2009).

I note that this is an area of evolving practice in labor relations cases.⁵ While the Board has not yet had occasion to fully articulate the standards that it expects will be employed by judges when *in camera* inspections are demanded, it is apparent that there are competing policy considerations involved. Because of the importance of those considerations, I think it is clear that a party's demand that documents subject to a claim of privilege should be submitted for an *in camera* inspection is, by itself, insufficient to trigger a requirement that the judge perform such an inspection. In *U.S. v. Zolin*, 491 U.S. 554 (1989), the Supreme Court addressed this question in the context of a demand for *in camera* inspection in order to determine whether the crime-fraud exception to the attorney-client privilege applied to certain documents. The Court expressed its views as follows:

We turn to the question whether *in camera* review at the behest of the party asserting the crime-fraud exception is *always* permissible, or, in contrast, whether the party seeking *in camera* review must make some threshold showing that such review is appropriate. In addressing this question, we attend to the detrimental effect, if any, of *in camera* review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be made.

. . . .

³ As the trial began, I advised all counsel that, "at the conclusion of the trial, if anybody has an outstanding subpoena request that has not been resolved, either by some agreement among the parties or by a ruling from me, I'm expecting that you will put that on the record before we leave this room. If it's not on the record before we leave this room, I'm going to consider it as waived I don't want anybody sandbagged after this trial has concluded by some allegation that there is an unresolved subpoena issue." (Tr. 30.) With the exception of the matter about to be addressed, no party raised any such unresolved subpoena issue at the conclusion of the trial or in their briefs.

⁴ I have previously discussed the significance of privilege logs in connection with my service as the Board's special master in *CNN America, Inc.*, 353 NLRB 891,899–901 (2009).

⁵ In *CNN America*, supra at 894 fn. 22, I expressed my concern that the increasing volume of litigation regarding these issues represents a departure from venerable established practices and may have negative consequences. Nothing that has transpired in this case has altered my view in that regard.

A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception . . . would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.

491 U.S. at 571. [Citations omitted. Italics in the original.] The Court selected a standard that required the moving party to show an adequate factual basis to support a good-faith belief by a reasonable person that *in camera* inspection may reveal evidence to establish that the material is not protected by privilege.

I think it likely that the Board intends that administrative law judges require a similar showing. In discussing the policy considerations involved, the Board has first noted,

[w]ithout an *in camera* inspection of allegedly privileged documents, the party claiming privilege would be able to shield any document from disclosure by merely including it in a privilege log Thus, we find that the *in camera* examination of documents to evaluate claims of privilege is a proper exercise of the administrative law judge's authority.

CNN America, Inc., 352 NLRB at 449. On the other hand, the Board has addressed the importance of both the attorney-client and work product privileges in labor law cases. See *Smithfield Packing Co.*, 344 NLRB 1, 13 (2004), enf. sub nom. *Food & Commercial Workers Local 204*, 447 F.3d 821 (D.C. Cir. 2006) (attorney-client privilege is fundamental in assuring "the open communication necessary for accurate and effective legal advice"), and *Central Telephone Co. of Texas*, 343 NLRB 987, 990 (2004) (failure to honor the work product privilege would "hinder the ability of lawyers to advise their clients" and undermine goals involved in labor relations policy).

Given these important competing interests, I believe that the Board would expect a party seeking *in camera* inspection to demonstrate either that there are articulable grounds to suspect that counsel's representations in the privilege log are unreliable or that the circumstances involving the particular item or items being proposed for inspection are such that counsel's good-faith assertion of the privilege must be evaluated by a neutral adjudicator. As to the first of these criteria, I took care to obtain a clear representation from counsel for the Employer regarding the analytical process underlying his assertions in the privilege log. My colloquy with counsel for the Employer went as follows:

JUDGE: I'm going to phrase it this way—that your firm, the attorneys in your firm, went through the subpoenas, identified the documents on the log as responsive to the subpoenas but protected by privilege, and that this represents a good faith, professional judgment about these documents, based on the application of our understood standards of what constitutes attorney-client and work product privilege. Are you prepared to make such a representation to me?

MR. FRASER: Yes, Your Honor. I'm prepared as the supervising lawyer in this matter, to confirm that the statements you have made are accurate.

(Tr. 409.) Opposing counsel have not pointed to any articulable reason to cast doubt on this clear certification by counsel for the Employer regarding the quality of his representations as contained in the privilege log. Furthermore, nothing in his conduct of the trial of this case raised any such concern in my mind. For these reasons, I did not conclude that there was any cause to doubt the good faith underlying the representations made in the privilege log.

As to the second prong of my proposed analytical standard, the Board has urged that particular care be taken. Thus, while there may certainly be circumstances apparent from the nature of a particular document subject to a claim of privilege that may demonstrate the necessity for in camera inspection, these must be clearly shown to exist. For example, the Board has observed that, apart from general considerations related to the nature of the attorney-client relationship, "[f]or specifically labor law policy reasons as well, when the legal advice relates to collective bargaining, we will not readily and broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present." *Patrick Cudahy, Inc.*, 288 NLRB 968, 971 (1988).

With these policy considerations at the forefront, I concluded that the parties seeking inspection had documented a need for inspection of only one class of documents. Those documents involve a situation essentially identical to one faced by the Board in the *CNN America* case. In that case, one high-ranking corporate official who had participated in key events involved in the controversy was an attorney. The company contended that documents sent or received by that official were privileged because she was acting as in-house counsel. In those circumstances, the Board directed that the documents be subjected to in camera inspection by the judge in order to determine whether each item represented a "communication between attorney and client related to the giving of legal advice that is privileged—not simply documents that pass between them." *CNN America*, 352 NLRB at 442. [Quotation marks and citation to *Patrick Cudahy* omitted.]

In the case currently before me, there is a corporate official of the Employer who is similarly situated. R. Paul Viar Jr. is the Employer's director of administration. As such, he oversees the Company's human resources operation and serves as the chief labor negotiator for collective bargaining. He is also an attorney licensed to practice in Michigan. As he described it, he had a "dual role . . . [p]art legal counsel, and I was the chief internal strategist and decision maker for the negotiations. So two roles." (Tr. 483.) Because the situation is indistinguishable from that in *CNN America*, and because it clearly raises a reasonable question regarding the extent of the coverage of the privilege to Viar's communications, I directed that the Employer submit those communications to me for in camera inspection. Specifically, there are 23 such documents as listed by counsel for the Employer at my direction on a separate

privilege log entered into the record as Administrative Law Judge's Exhibit 2.⁶

Although it is evident from the foregoing discussion that the Board has vested its judges with the authority to conduct in camera inspections in appropriate circumstances, counsel for the Employer declined to submit the 23 documents to me for such review. I understand his reasoning. It must be recognized that the Sixth Circuit has taken a contrary view from that of the Board. In *NLRB v. Detroit Newspapers*, 185 F. 3d 602 (6th Cir. 1999), it held:

Despite the general policy that the NLRB should have jurisdiction in labor-management disputes, Congress specifically reserved to the federal courts the authority to provide for enforcement of subpoenas. We believe it is implicit in the enforcement authority Congress has conferred upon the district court . . . that the district court, not the ALJ, must determine whether any privileges protect the documents from production.

While the Board has opined that the Sixth Circuit's holding does not support "the general proposition that an administrative law judge, as the trier of fact, cannot resolve privilege issues," the holding certainly renders counsel's position comprehensible. *CNN America*, 352 NLRB at 449. So long as this apparent conflict between higher authorities continues to exist, my duty is plain. As the Board has directed, "it remains the judge's duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved." *Insurance Agents* 119 NLRB 768, 773 (1957), cited with approval in *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). For this reason, my order requiring in camera inspection of the 23 documents stands. It remains for the General Counsel to determine what enforcement efforts to undertake.

Although the Employer has declined to comply with my order for in camera inspection of the documents set forth in Administrative Law Judge's Exhibit 2, I, nevertheless, closed the record at the end of the trial.⁷ I did so in conformity to the Board's policy as explained in *CNN America*. In that case, subpoena enforcement issues remained outstanding even after

⁶ For reasons probably related to software limitations and time constraints, the log appears to include 25 items. It will be seen that the first two of those are not actually documents but merely descriptors.

⁷ Both the General Counsel and the Union urge me to draw an adverse inference from the Employer's refusal to comply with my order for in camera inspection. As they correctly note, such an inference is only justified where the circumstances support a conclusion that the materials are being withheld because "that evidence will be unfavorable to the cause of the suppressing party." *National Football League*, 309 NLRB 78, 98 (1992). I decline to draw such an inference in the situation presented here. It is equally likely that counsel for the Employer refuses to comply with my order based on a good-faith belief that controlling legal authority does not grant me jurisdiction to conduct the in camera inspection. This constitutes the sort of "satisfactory explanation" that defeats the adverse inference. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977).

the trial judge had issued his decision. The respondent argued that the issuance of that decision had rendered the subpoena disputes moot. The Board rejected this argument, noting that the trial judge's decision was not final and that, "it is possible that the continued pursuit of allegedly privileged information that is the subject of the subpoena enforcement proceeding may yield information that the General Counsel or the Union wishes to offer into evidence to further support their position." *CNN America*, 353 NLRB at 896. The Board noted that the proper procedure in that event would be the filing of a request to reopen the record. The Board certainly grants such relief when its standards are met. For those standards, see Section 102.48 of the Board's Rules and Regulations, and *APL Logistics, Inc.*, 341 NLRB 994 (2004), and *Manhattan Center Studios, Inc.*, 342 NLRB 1264 (2004).

Suffice it to say that I am satisfied that the existing record, even without access to the 23 documents discussed above, is entirely adequate to decide this case. Therefore, on the entire record,⁸ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, is engaged in the manufacture and sale of automotive parts and related products at its facility in Bronson, Michigan, where it annually sells and ships goods valued in excess of \$50,000 directly to customers located outside the State of Michigan. The Employer admits⁹ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Employer, Douglas Autotech Corporation, is a Delaware corporation, that has been in existence for a century. It produces parts for automobiles, trucks, and other heavy industrial applications. These items are manufactured in two facilities located in Hopkinsville, Kentucky, and Bronson, Michigan. The Company is owned by an International concern, Fuji Kiko Company, Ltd.

⁸ During the August resumption of trial, the lawyers and I made several corrections to the transcript of the June proceeding. See Tr. 398–399. A few additional errors in the August transcript also require correction. At Tr. 560, L. 24, "blackout letter" should be "lockout letter." At Tr. 629, L. 16, "We got a recall," should be "We got to recall." At Tr. 767, L. 25 and again at Tr. 768, L. 1, "employing" should be "employees." Any other errors are not significant or material. It is also noted that there was an omission from the original version of the formal papers consisting of the final page of the Employer's motion for a bill of particulars. The motion is included in the formal papers at GC Exh. 1(g). The final page of the motion has now been added as GC Exh. 64.

⁹ See pars. 2, 3, and 4 of the Employer's answer to complaint and the Tr. 10. (GC Exh. 1(h).)

Several corporate officials have played a significant role in the events underlying this controversy and the ensuing litigation. As already mentioned, R. Paul Viar Jr., is the director of administration for Douglas. He has been employed by the Company for over 4 years and served as its director of human resources before being promoted to his current position. He is also a licensed attorney. He described his current duties as including administration of all human resources policies and programs, management of benefit programs, general administrative duties, and the supervision of all litigation. Notably, he serves as the "principal officer in charge of collective-bargaining" and labor relations. (Tr. 360.)

In addition to Viar, another key management participant in labor relations matters is Glenn Kirk. Kirk currently holds positions as the director of finance and director of sales. He also serves as a member of the board of directors. Kirk possesses extensive experience in labor negotiations gained during his prior career. Viar testified that Kirk was involved in the current labor issues as both the "chief financial guy" responsible for costing out the various proposals and also as a negotiator. As Viar put it, "I leaned on him a great deal to help me with the strategy." (Tr. 524.)

In addition to Viar and Kirk, the third key labor negotiator for the Company was Bruce Lillie. Lillie has been a labor relations lawyer for approximately 20 years. He has served as outside counsel to the Company for 12 of those years. He testified that, during the collective-bargaining process involved in this case, he "filled the role of chief negotiator." (Tr. 961.)

Viar, Kirk, and Lillie are the primary figures involved in this controversy on behalf of the Employer. Two members of upper management also bear mentioning. Toru Hasegawa is the Company's chief executive officer and a member of its board of directors. Koichi Kawakyu is the president of the Company and is also a board member.

While the Company's work force in Kentucky is unrepresented, the employees in Michigan have been represented by Local 822 of the UAW since April 1941. In fact, Local 822 exists solely to represent those employees of the Company. As of the key events in this case, there is no dispute that the bargaining unit consisted of at least 114 active employees.¹⁰ There were also two employees on sick leave, Marcy Schorey and Gordon Diamond. One employee, Dusty Modert, was receiving workers' compensation. The parties dispute the status of another employee, Beverly Vickers. The Company contends that she was on active status, while the General Counsel claims that she was on sick leave.¹¹ Finally, it is undisputed that another 30 bargaining unit members were on layoff status.

During these events, Local 822 was led by Phillip Winkle. Winkle has been an International representative for the UAW since April 2001 and was assigned to Local 822 as of March 2002. Winkle had the leading role in labor negotiations on

¹⁰ Regrettably, one active employee, Carolyn Chapman, died on December 1, 2008.

¹¹ The parties did not make an evidentiary record sufficient to resolve this question. To the extent it is necessary to determine her status, this may be undertaken during the compliance phase of the proceeding.

behalf of the Union. He was assisted by bargaining unit members, principally including Mary Ellis and Frank Gruza. As matters progressed, they were also joined by outside counsel for the Union, John Canzano. For the past 30 years, he has practiced labor law, representing unions.

Over the decades, the Company and the Union entered into a series of collective-bargaining agreements. The most recent such agreement became effective on May 1, 2005, and expired on April 30, 2008. (GC Exh. 2.) In preparation for contract talks, Lillie and Kirk held a preliminary meeting on December 10, 2007.¹² The first negotiating session followed on January 24, 2008. Viar testified that the Employer was “in horrific financial shape, really bad financial shape, going into the negotiations.” (Tr. 605.) Management provided financial information to the Union indicating that the Company had lost \$35 million during the preceding 2 years. Given the situation, management’s objectives for the contract negotiations were described by Viar, who reported that, “we needed concessions. We needed systemic across-the-board improvement on how we did business in order to keep the doors open.” (Tr. 613.)

At trial, the Company’s witnesses testified that they could not comprehend the Union’s response to the Company’s situation. As Viar put it, “each and every time we sought out the Union’s help in helping us survive, it was a barrage of no and different forms of no and equal and contemporaneous barrage of how stupid the company was.” (Tr. 614.) I must observe, however, that management actually sent mixed messages to the Union. While it stressed the current poor financial condition, Chief Executive Officer Hasegawa also addressed the unit members in a more positive vein. As described by Kirk, he told them, “[W]e have new business coming and that we felt like, if we could survive through till the new business got there; we had a very bright future ahead of us.” (Tr. 924–925.)

Whatever the parties’ differing perspectives, the fact remains that while negotiations continued in the months leading up to the expiration deadline, no significant agreements were reached on any topic. On February 19, Winkle hand delivered a so-called 60-day notice to Viar informing him that the Union proposed to terminate the parties’ collective-bargaining agreement upon its expiration date. (GC Exh. 5.) Winkle provided uncontroverted testimony that, as he instructed his secretary to prepare this notice, he also told her “to file the 30-day notice at the same time.” (Tr. 87.)

Winkle’s references to 60- and 30-day notices track the requirements of Section 8(d) of the Act. Thus, where the parties have a contract, Section 8(d)(1) requires that a party wishing to terminate that contract must provide written notice of the intent to so terminate to the other party 60 days prior to the expiration of the contract. In addition, Section 8(d)(3) requires the party seeking termination to provide additional notices within 30 days to the Federal Mediation and Conciliation Service (FMCS) and to state agencies established to mediate and conciliate disputes.

¹² I base the exact date on Kirk’s testimony. It is interesting to note the precision of his recollection of such rather remote preliminary events. The quality of his memory about these items contrasts with his asserted difficulties in recalling more significant and recent events.

It is undisputed that Winkle’s secretary failed to prepare or file the required 30-day notice, thus, setting in motion the train of unfortunate events that have culminated in this lawsuit.¹³ Before events reached their crisis point, the parties engaged in last minute negotiations. During such a session on April 28, an event occurred that the Company has chosen to characterize as severe misbehavior by Winkle consisting of inflammatory conduct involving “a deliberate racial slur.” (Tr. 616.) Examination of this event is useful in aiding in the overall assessment of the credibility and probity of the Company’s officials.

Viar testified that the Company’s president, Kawakyu, participated in this session and asked the Union for an extension of the current agreement so that the parties would have more time to bargain. In response, Winkle “rose up in his chair and shouted 1941 at the Japanese president.” (Tr. 616.)

Scrutiny of this event reveals that Winkle did not engage in any racist conduct and was not making any reference to Pearl Harbor as suggested in Viar’s testimony. In fact, Viar admitted that as Winkle shouted “1941,” he was waiving a book at Hasegawa. That book was the parties’ current collective-bargaining agreement. More significantly, the matter was illuminated during cross-examination of Viar. Viar was impeached by his own notes of the bargaining session which clearly revealed that Winkle’s actual historical reference was that, “[s]ince 1941, there’s been a contract with the [Company] and the UAW.” (Tr. 735.) During this testimony it became clear to me that Viar was attempting to twist and distort Winkle’s conduct in an effort to paint him as a racist and a boor. This episode forms part of a larger pattern of misconduct on the witness stand that persuades me that Viar’s versions of events cannot be trusted unless clearly corroborated by other reliable evidence. His willingness to stoop to underhanded tactics reveals a depraved state of mind with reference to this dispute.

It is uncontroverted that the Union declined to agree to a contract extension. The parties met once more on April 29. At that time, the Union again refused to agree to any extension of the contract that was about to expire.

In the late evening hours of April 30, Winkle met with Ellis and Gruza. They prepared a handwritten notice to the Employer “to formally inform the Company that the U.A.W. Local 822 will be on strike at 12:01 May 1, 2008.” (GC Exh. 6.) This was signed by the three union officials and was personally delivered to Viar just before midnight. Viar reported that he was present in his office at that late hour, because “I had to prepare for the very real possibility of a walkout that night at midnight.”¹⁴ (Tr. 619.) After the brief meeting with the Union leaders, Viar notified other managers of the strike. He also looked out his window and observed 20 to 30 people outside

¹³ Winkle’s testimony about the failure to file the required 30-day notice was quite dramatic. Twice during his account, he struggled to keep his composure. It was evident that his role in precipitating these unfortunate events has had a profound effect on him. His remorseful demeanor and emotional presentation as he described what occurred impressed me. These factors contributed to my overall conclusion that he was a reliable informant.

¹⁴ Indeed, management had been making preparations for some time. For example, Kirk testified that in the days leading up to the strike, the Company hired security guards.

who were carrying signs. Winkle confirmed Viar's observation, indicating that the signs said, "On Strike." (Tr. 194.)

At this point, it should be observed that all of the parties are in agreement that the strike that began on May 1 was an economic strike. (See Tr. 84.) As Winkle explained, "[W]e called a strike to put leverage on the Company to get our just demands." (Tr. 84.) On May 1 and 2, the Union maintained its picket line. At the same time, management implemented plans to continue operations during the strike. These plans consisted of the recruitment of a replacement work force that included salaried staff, workers referred by an employment agency, persons referred by the salaried staff, and local candidates for employment who appeared at the plant. Implementation of management's plans resulted in the operation of the facility without any interruption.

Winkle provided uncontroverted testimony that he received a telephone call from a union official in Jackson, Michigan, sometime between 2:30 and 3 p.m. on May 2. The information provided by the caller caused him to make inquiry regarding the Union's filing of the 30-day notice required under the Act. As Winkle described it, when he quizzed the secretary responsible for preparing the notice, "she was in tears. She said she couldn't find the 8(d) notice." (Tr. 89.) It was at this moment that Winkle first realized that the strike was unlawful.

On the following day, May 3, Winkle and another UAW official held a meeting with Ellis and Gruza to explain the situation and formulate a response. He testified that he told the bargaining unit representatives, "All I know is that it is a violation of the law. We need to fix it. We need to get the people back to work." (Tr. 167.) It was decided to obtain the consent of the Union's membership to an immediate cessation of the strike by making an unconditional offer to return to work. As Winkle explained in response to cross-examination by counsel for the Employer:

[W]e knew that we hadn't filed the 8(d) notice, and common sense said we were in jeopardy. We were on a strike that violated the law, that we needed to get the people back in the plant. You know, and so we offered—that's why we came up with the unconditional offer.

(Tr. 168.) Winkle also explained that he chose not to inform management of the failure to file the required notice because he concluded that it would not be "prudent" to do so. (Tr. 170.)

Having determined that the best response to the dilemma confronting the Union was to make an immediate and unconditional offer to return to work, the leadership called a membership meeting for the following day, May 4. At that meeting, the membership voted to adopt the recommended plan.

With the consent of the membership, Winkle implemented his plan to repair the damage early on the following day, Monday, May 5. He began by having his secretary prepare the 30-day notice using the appropriate Federal Mediation and Conciliation Service's F-7 form. This was filed at 7:55 a.m. (GC Exh. 3.) He also drafted a letter to Viar, informing him that "our membership UAW Local 822, your employees, are immediately returning to work unconditionally." (GC Exh. 7.) Armed with this letter, Winkle went to the plant early in the morning. He was accompanied by the entire complement of

day shift employees. He testified that he brought the employees with him, "in case the Company said come on back to work, and we wanted to be able to report to work." (Tr. 97.)

When Winkle attempted to hand deliver his letter to Viar, he was intercepted by a security guard who informed him that, "Mr. Viar is not accepting any documents. Put it in the mail." (Tr. 96.) The guard ordered Winkle to leave the premises. In a further effort to make immediate delivery of his letter, Winkle then had it faxed to the Employer's human resource department. This was accomplished shortly after 7 a.m.

Winkle received the Company's initial response a very brief time later in the form of a telephone call from Lillie. Lillie asked Winkle if the bargaining unit members were "trying to come back to work," and Winkle replied that, "[y]es, we've offered an unconditional offer to come back to work." (Tr. 97.) Lillie opined that this was not consistent with his expectations regarding the duration of the strike and advised Winkle that he would have to get back to him later. At roughly this point, the Union's pickets ceased carrying strike placards. They substituted hand lettered signs reading, "Locked Out." Approximately 3 hours after his first conversation with Winkle, Lillie responded with another phone call requesting that Winkle and the bargaining committee meet with the Company's officials at a hotel in East Lansing that evening. Winkle agreed.

In the hours prior to the scheduled evening meeting, Viar, Kirk, and Lillie formulated the Company's response to Winkle's letter offering an immediate and unconditional return to work. The evidence demonstrates that, during this process, the Company's representatives had made a shrewd and accurate appraisal of the circumstances underlying the Union's unexpected offer to end the strike. As Viar explained:

[O]n May 5th, 2008, during the phone conversation we had with Mr. Lillie, that Glenn Kirk and I, Bruce asked me to find the 60-day notice in the record, and then he asked for the first time [about] something he called 30-day notice. And we had a discussion about the potential impact of that 30-day notice not being in the record.

(Tr. 708–709.) Viar added that the management officials, "[s]uspected, surmised, we knew something as I've testified, was wrong because I couldn't find it [the 30-day notice]."¹⁵ (Tr. 709.) Viar's testimony on this significant point is corroborated by Kirk's testimony that Lillie raised this subject, observing "that it's possible that something is amiss with the strike."¹⁶ (Tr. 846.)

¹⁵ Viar made the same point on another occasion during his many appearances as a witness in this trial. He was asked if, at the time of the May 5 meeting, he knew that the strike was unlawful. He responded that, while he did not know this, "I suspected, surmised, that something was very wrong, yes." (Tr. 637.) When asked why he was suspicious, he explained that, "[b]ecause Bruce Lillie had raised the possibility with me, and we had had a discussion that day about a mediator not being involved in any of our discussions, I suspected that the strike was illegal and that the F-7 notices had not been filed." (Tr. 637.) He added, "[I]t was fishy. Where's the mediator? Oh yeah, where's the mediator?" (Tr. 638.)

¹⁶ In contrast, I find Lillie's testimony on this issue to be evasive and misleading. He asserted that, in evaluating the Union's strategy, he was

Having first accurately assessed the situation underlying the Union's sudden offer to return to work, the Company's managers now formulated their response. This consisted of a letter and attached documents. These items were drafted over the course of the day and finalized during a late afternoon meeting attended by Lillie, Viar, and Kirk. They were hand delivered to the Union's representatives at the evening meeting in East Lansing.

Because the Company's written response to the Union's offer to return to work is critical to the disposition of this controversy, it is appropriate to quote it in full. That letter, dated May 5 and addressed to Winkle, stated:

Earlier today, the Company received the Union request to return from the Strike. The offer to return to work was unconditional.

Please be advised that effective immediately, the Company is locking out the bargaining unit in support of its bargaining position. (See attached.)

Please advise the Company as soon as possible if the Union accepts the proposal and when an Agreement has been reached so that employees can be expeditiously returned to work.

(GC Exh. 8, p.1.) The letter is signed by Viar. The attachment is entitled, "DOUGLAS AUTOTECH COMPANY PROPOSAL/GENERAL SYNOPSIS AND SUPPORTING DOCUMENTS." It consists of 15 pages that appear to contain a variety of deletions, substitutions, and additions to the parties' expired collective-bargaining agreement. (GC Exh. 8, pp. 2-16.)

While the witnesses all agree that this letter was presented to the Union at the evening meeting, their accounts of what was said at the meeting are vastly divergent. For reasons that I am about to explain, I credit Winkle's testimony regarding those statements and reject the Company's witnesses' accounts as fabrications.

Winkle succinctly described the discussion as, "We offered to go back unconditionally, and the Company offered an entire [collective-bargaining] agreement." (Tr. 150.) He explained that the Company conveyed its position as, "when we get a contract, we'd go back to work." (Tr. 150.) Winkle probed Lillie as to the nature of the Company's written response, asking, "Is this what you want us to come back under, this 15-page document?" (Tr. 101.) Lillie replied, "No, absolutely not," adding that, "[W]e'd like for your guys to consider this, and if you would, get back with us sometime tomorrow on this." (Tr. 101.) Winkle also clearly testified that there was no discussion as to the legality of the strike.

concerned that they were engaging in an intermittent strike or that they were offering to return to work because the Company's replacements were able to maintain production. Lillie contends that, "I didn't know that the strike was illegal on May 5th." (Tr. 1017.) While this may be literally true, it is nevertheless substantially misleading. Although Lillie could not have known to a certainty that the Union had failed to file the 30-day notice, Viar and Kirk's testimony clearly shows that Lillie believed that this was the case and that he was able to support this conclusion with Viar's inability to locate the notice in the Company's files and with the unusual lack of intervention from the FMCS.

On the witness stand, Viar presented an account of the meeting that differed in a key respect from that of Winkle. He began his account by agreeing with Winkle that Lillie told the Union's representatives that the Company was locking out the bargaining unit members. He also reported that Lillie told Winkle that the terms and conditions for their return to work were set forth in the attachment to the letter announcing the lockout. He then asserted:

[I]t was a very emotional meeting. I remember Mr. Lillie being very emotional, very pointed. You know, he advised the Local Union that we thought that the strike was illegal. We had not waived any rights. We had provided some terms and conditions for them to come back to work. The Local Union indicated through Mr. Winkle that they would let us know the next day, and then that was it. [Tr. 642.]

In evaluating this testimony, I find that the General Counsel has presented clear and convincing evidence that it is contrived. Viar's account was directly impeached by the contents of an affidavit that he provided on May 23, 2008. In this sworn statement given just weeks after the events it purports to describe, Viar made no mention whatsoever of any statement by Lillie involving the illegality of the strike and the lack of waiver of any rights by the Employer. To the contrary, Viar's description of the meeting was as follows:

I attended the meeting with the Union's bargaining committee at 6:00 p.m. that evening. Attorney Lillie provided the Union with a letter stating that they were locked out. Attached to the letter was a synopsis of the Employer's bargaining position. Attorney Lillie asked the Union if they were willing to return under the conditions stated in the synopsis. UAW [R]epresentative Winkle stated that he would let the Employer know.

(Tr. 712.) After being asked to read the entire affidavit, Viar confirmed that it did not contain any mention of the waiver of rights statement by Lillie or anyone else.

It is evident to me that Viar's account provided very shortly after the events in question and before the litigants' positions had hardened is much more likely to be accurate. I base this not merely on proximity in time, but also on the inherent improbability involved in Viar's subsequent claim, given his contention that Lillie's alleged statements regarding the illegal strike and the lack of waiver of rights were made in a "very emotional, very pointed" manner. (Tr. 642.) If that were true, it is inconceivable to me that Viar would have failed to include those same statements in his affidavit describing the meeting shortly after it had taken place.

I recognize that Kirk provided testimony that attempted to corroborate Viar's fabricated account of Lillie's statements during this crucial meeting. Kirk testified that, during the meeting, Lillie presented Winkle with the Company's letter and told him, "that we did not want them to return to work and that—unless they met the terms and conditions that we spelled out in the attachment to that letter." (Tr. 840.) He went on to claim that Lillie made additional statements as follows:

We have reason to think that something is not straight. I think he said that maybe—my recollection was he said that—

reason to believe the strike was illegal and that we were reserving all of the rights accorded to the company under the Act.

(Tr. 842.) He was unable to recall any purported response to this from Winkle.

As with Viar, the General Counsel successfully impeached this version of events by introducing Kirk's prior affidavit. Kirk was forced to concede that his earlier account discussed the May 5 meeting but failed to include any mention of the illegality of the strike and the Company's purported reservation of rights. Indeed, in that affidavit, Kirk indicated that Lillie made statements regarding reservation of rights at a meeting with the Union held on May 21. He went on to note that,

[t]he 5/21 meeting was not the only meeting in which Lillie told the Union that their strike was illegal and that our meeting with them was in no way a waiver of our rights. I believe Lillie made such announcement at all of the meetings I attended after the 5/21/08 meeting.

(Tr. 902.) It is striking that Kirk fails to assert a similar statement by Lillie at the May 5 meeting despite Viar's report that the statement was both emotional and pointedly made. Given the importance of this matter to the Company's defense, I conclude that the failure to report such statements at the May 5 meeting was not an oversight or inadvertent omission. Instead, I conclude that Kirk failed to include the statement in his account because the statement was never actually made.

Finally, I acknowledge that Lillie also provided testimony designed to corroborate the claim that he made statements regarding the illegality of the strike and the reservation of the Company's rights during the May 5 meeting. As with his colleagues, this account does not hold up under scrutiny. In the first place, when asked on direct examination by counsel for the Company to describe what occurred at the May 5 meeting, Lillie's account tracks that offered by Winkle. Thus, he testified that he told the union representatives, "[W]e understand that the Union is making an unconditional offer to return to work." (Tr. 966-967.) He then referred to the Company's written response, adding that, "if they wanted to come back to work unconditionally, here are those conditions for which they could return to work." (Tr. 967.) He reported that the Union's officials indicated that they would provide their response on the following day.

I find it highly probative that when asked in an open ended manner to provide his account of the May 5 meeting, Lillie failed to include any mention of a discussion about the legality of the strike and the Company's reservation of any rights. After a digression, counsel for the Employer again asked Lillie for his account of the meeting. Lillie repeated the precise version just recounted, the version that largely matches Winkle's account. At this juncture, counsel for the Employer asked him, "Did you make any comments to the Union about not waiving rights?" (Tr. 977.) I sustained an objection to this leading question. Whereupon, counsel asked the witness, "Did you make any comments—to the extent you haven't confirmed all you've said to the Union, at the beginning of that session on May 5, did you make any additional comments?" (Tr. 978.) It was only after this repeated prodding that Lillie rather lamely

added that, "we were indicating that we were not waiving any rights." (Tr. 978.) I do not credit this testimony, finding it to be a reluctant fabrication extracted by the use of repeated leading questions. Instead, I credit Lillie's original unvarnished description of the meeting, a description that serves to underscore the reliability of Winkle's testimony.

My conclusions about Lillie's testimony are further confirmed by counsel for the General Counsel's impeachment of this witness as well. Once again, counsel demonstrated that the witness' earlier account differed from the extracted testimony in the crucial aspect. Thus, Lillie conceded that he gave an affidavit almost a year prior to the date of his trial testimony. In that affidavit, he swore that,

[o]n several occasions following the local strike, I declared to the Union that we felt that their conduct was illegal in that strike. I believe that I told the Union at the start of several but not all bargaining sessions that followed the 5/1—5/5/08 strike with that remark. I would tell them each time that we thought their conduct of the strike was illegal and that we were not waiving any of our rights in regard to that.

(Tr. 1021.) Tellingly, Lillie's affidavit goes on to note that, "I did not make any such remarks of this kind in our 5/5/08 meeting."¹⁷ (Tr. 1022.)

Counsel for the Company presented an enigmatic document prepared by Lillie in an effort to bolster Lillie's belated contention that he raised these issues on May 5. It consists of a copy of the Company's letter to the Union announcing the lockout. The copy is annotated with notes written by Lillie. At the top of this document is Lillie's hand-written annotation, "Master 6 00 pm." (R. Exh. 7.) At the bottom of the letter, there are other notations written by Lillie. Those notes, in pertinent part, state, "5/5/08 meet w/Union—not waiving rts." (R. Exh. 7.) Lillie testified that he made the notes in advance of the meeting and that they represented his "talking points." (Tr. 969.) Substantial doubt was cast on this assertion when Lillie had to concede that other portions of the same notations were written during the meeting. Furthermore, during cross-examination, counsel for the General Counsel established that the Regional Office's investigator had asked Lillie to provide copies of all notes that he possessed regarding the waiver of rights issue and that Lillie had provided materials in response to this request. He testified that those materials did not include the document (R. Exh. 7) now being offered in support of his account. Even more troubling, under cross-examination, Lillie conceded that the Company had provided yet another version of the same document that counsel for the Union described as, "the identical letter called 'Master, 6 p.m.,' and it didn't have the same jottings" at the bottom regarding the issue of waiver of rights. (Tr. 1052.) I cannot ascribe any weight to these handwritten comments as there is no credible evidence regarding the time of their creation and they directly contradict both Lillie's original trial testimony and his affidavits.

¹⁷ Counsel for the General Counsel impeached Lillie with a second affidavit that also mentioned the May 5 meeting but failed to indicate that there was any discussion of the legality of the strike or any reservation of rights by the Company. See Tr. 1032.

It is appropriate to make one additional observation regarding the evaluation of the conflicting accounts about the May 5 meeting. The Company's negotiators worked on the preparations for this meeting throughout the day. In addition, they held a preparatory conference in the late afternoon. All three men had extensive experience in the field of labor relations. Thus, the working group consisted of the Employer's in-house labor lawyer, their outside labor lawyer, and a nonlawyer who possessed decades of experience in labor negotiations gained in his prior career. Despite the effort expended in preparing for the meeting with the Union and the vast and impressive expertise possessed by the Company's negotiators, the Company's written response to the Union's letter offering an immediate and unconditional return to work fails to make any reference whatsoever to the legality of the strike or the Company's intention to reserve any rights related to that question. In fact, as counsel for the Union observes in his brief, "[i]ncredibly, with over twenty attorneys (including Lillie and Viar) the Company's so-called 'reservation of rights' was *never* reduced to writing from May 5 until the parties rested at this hearing."¹⁸ (CP Br. at p. 31.) (Emphasis in the original.)

In sum, as to the crucial May 5 meeting, I conclude that the Company took the following action. It formally acknowledged, both orally and in writing, the Union's unconditional offer to return to work. It responded by locking out the bargaining unit members through clear written and oral statements to that effect. It presented a 15-page proposal that it deemed to be the terms and conditions of employment that the Union must accept in order to end the lockout. Finally, it made a written commitment that, upon acceptance of these terms and conditions, the "employees can be expeditiously returned to work." (GC Exh. 8, p. 1.) I further find that the Company did not raise any issue regarding the legality of the Union's strike, nor did it make any reservation of rights, either oral or written, concerning that matter.

On the day after this meeting, Winkle responded in writing to the Company's proposed terms and conditions required to end its lockout by making a request for financial information regarding the proposal. (GC Exh. 9.) Implicit in Winkle's response was the Union's decision not to make an immediate return to work on the Company's proposed terms.¹⁹ Shortly

thereafter, in response to Winkle's tardy submission of the 30-day notice to the FMCS, a mediator was assigned to the dispute and the parties were contacted for this purpose.

On May 8, Lillie telephoned Winkle regarding the contact from the FMCS. Both participants in this phone conversation agreed that Lillie asked Winkle about the 30-day notice. According to Lillie, he demanded a copy of the notice from Winkle and was informed that, "there was no way I was ever going to get it." (Tr. 986.) By contrast, Winkle testified that Lillie asked him if he had ever filed the notice, adding, "I don't think you have." (Tr. 102.) Winkle reported that he responded by telling Lillie that, "I filed my paperwork." (Tr. 102.) I have already noted that I found Winkle to be a credible informant and that I have concluded that Lillie, albeit reluctantly, has engaged in fabrication. I credit Winkle's account of this conversation for these reasons and because it strikes me as inherently implausible that Winkle would think he could successfully conceal a publicly filed government document from Lillie. Rather, I conclude that Winkle gave an answer that was technically accurate but, nevertheless, served to temporarily mask his filing error.²⁰

In this conversation, the two men also scheduled another negotiating session for May 21. During the interim period, the Company continued its effort to obtain the 30-day notice from both the Union and the FMCS. The Company also responded to Winkle's request for financial information.

The parties did meet on May 21 and were assisted by an FMCS mediator. Unlike the situation regarding the May 5 meeting, the parties generally agree that on this occasion Lillie asserted that the strike was illegal and that the Company was not waiving any rights. For example, Kirk testified that the meeting started, "[B]y Mr. Lillie stating to the bargaining committee that he thought the strike was illegal, we had reason to believe the strike was illegal, and that by meeting with them, we were not waiving our rights afforded to the company under the Act." (Tr. 851.) While Winkle disputed the precise timing of Lillie's statements, he agreed that Lillie told him, "Phil, I know now that you didn't file a 30-day notice, and I think that your strike was illegal." (Tr. 107.) He also conceded that, at some point during this meeting, Lillie attempted to reserve the Company's rights. Apart from this discussion regarding the Company's position, the parties agree that the Union explicitly rejected the Company's return-to-work proposal and made its own proposal for a new collective-bargaining agreement.

Two days after this meeting, FMCS provided the Company with a copy of Winkle's F-7 notification form. The parties held another bargaining session on June 2. The Company made a contract proposal and the Union rejected it. Lillie testified that he again warned the Union about the illegality of the strike and the Company's refusal to waive any of its rights. By contrast,

agreement, the proposal merely states, "Discuss—Employer reserves the right to make a proposal on these topics." (GC Exh. 8, p. 3.)

²⁰ Counsel for the Union characterized Winkle's response to Lillie's query as being "artfully" made. (CP Br. at p. 7.)

¹⁸ I am not adopting counsel's claim that the Company retained the services of over a score of lawyers. While the record shows that the Employer certainly had the benefit of the advice of many attorneys, I do not know the precise number.

¹⁹ I must observe that it would have been virtually impossible for the Union to have simply accepted the Company's proposal in order to return to work immediately. Even its authors conceded that it was incomplete. For example, Viar was asked what would happen to those sections of the prior collective-bargaining agreement that were not specifically deleted in the Company's proposal. He responded, "Boy, I guess I don't know." (Tr. 746.) He also testified that he did not know whether the prior grievance and arbitration procedures would continue in effect under the Company's proposal. Similarly, when asked what the terms of an agreement would be if the Union accepted the Company's proposal, Kirk responded, "I'm not sure that it spells it out in here." (Tr. 919.) Furthermore, on its face, the Company's proposal indicates that it is incomplete. For example, on the topic of letters of

Viar reported that he did not recall any discussion of the strike at this meeting.²¹

The parties' next meeting took place on June 13. The Company presented the Union with a letter advising that it would no longer apply or enforce the mandatory dues provision of the expired collective-bargaining agreement. (GC Exh. 15.) Three days later, the Company also provided written notice to the Union that it was planning to terminate health benefits for retirees "within the next few weeks." (GC Exh. 17.)

On July 1, the parties met again. On this and subsequent occasions, the Union's negotiating team was augmented by John Canzano, outside counsel to the Union. In a sidebar conversation with Lillie, Canzano proposed a plan whereby the bargaining unit members would return to work and the Union would agree to a no-strike pledge for 60 days with the promise to provide 7-day's notice of any strike thereafter. Lillie agreed to discuss this concept with management.

The parties met on the following day. Lillie rejected the proposed no-strike agreement and countered with a suggested "cooling-off" period. The parties were able to conclude such an agreement for a 60-day period and each side withdrew all outstanding unfair labor practice charges without prejudice. (GC Exh. 19.) Witnesses for both sides testified regarding the other matters that were discussed during this meeting on July 2. Examination of their conflicting accounts sheds additional light on the credibility issues that I have confronted throughout this proceeding. Winkle and Canzano reported that Winkle asked management about the status of the replacement workers at the plant. He testified that Viar responded to his question by explaining that, "[w]e've told you that the replacement workers are temporary. They're on temporary status." (Tr. 129.) Kirk confirmed this, adding that the replacements have been told, "when we get a contract and come back to work—you guys come back to work, they go out." (Tr. 129–130.)

When first asked whether there was any discussion of "return-to-work-issues" during this session, Viar responded negatively. (Tr. 667.) He was forced to amend his position when shown the Company's own minutes of the meeting that reflected such a discussion. In fact, those minutes indicate that Kirk told the Union's representatives that, "[w]e meet w/staff weekly & temp periodically[.] [N]o time has it been couched as perm replacements." (R. Exh. 4, p. 10.) The minutes also reflect Lillie commenting that, "[p]lans for how to bring back work force already being discussed." (R. Exh. 7, p. 10.)

Kirk testified that there was a discussion, "about replacement workers, about whether or not they were permanent or not permanent, temporary or permanent." (Tr. 877.) When asked for details regarding this topic, he asserted that he "can't recall" what was said.²² (Tr. 877.) I readily conclude that Winkle and Canzano accurately described those matters that Viar initially

claimed were not raised and that Kirk indicated that he was unable to recollect.

By the same token, Viar testified that, during this meeting, "Again, Mr. Lillie reminded the Local Union that the strike was illegal and that we were not [waiving] our rights in meeting with them." (Tr. 667.) This testimony was severely undercut by examination of the Company's minutes. Although Viar agreed that when he prepared this version of the minutes, "I wanted to be as accurate as possible," there is absolutely no mention of any discussion of the legality of the strike or of the Company's assertion of any reservation of rights. (Tr. 718.) Under examination, Viar was forced to concede as much.

Over the next few days, the parties traded detailed contract proposals and held another bargaining session on July 14. This was followed by yet another meeting on the next day. Viar's testimony about that session continues to reflect my grave concern regarding the credibility of the Employer's witnesses. He was asked whether there was any discussion of the illegality of the strike during the July 15 meeting. He testified that he did not recall such a discussion. Later on, counsel for the Company asked Viar to review an affidavit he had previously given. Thereafter, he changed his testimony, reporting that during this meeting Lillie told the Union about, "our belief, our conviction, that the strike was illegal, and we were not waiving any of our rights in continuing to meet with them." (Tr. 680.) This was again severely undermined by the complete absence of any report of such a statement in the Company's own minutes of the meeting. (R. Exh. 4, pp. 17–21.) As Viar put it when confronted with those minutes, "That's right, I don't see it." (Tr. 719.)

The evidence suggests that the course of the parties' negotiations during the "cooling off" period was highly variable and that the participants veered between optimism about reaching an agreement and despair that this goal was unattainable. On the positive side, Winkle testified that, during mid-July, Lillie told him that "he liked what he heard" from the Union and that, "[w]e were making progress to getting an agreement." (Tr. 131.) This is also reflected in an email from Lillie to Canzano and Winkle on July 21. In this missive, Lillie posed a series of questions related to the bargaining proposals. Among those questions was one related to the Union's objections to reaching an agreement that would remain in effect for longer than 3 years. He posed a rhetorical question to the Union's negotiators, "Isn't a longer contract better for the employer and the work force?" (GC Exh. 22, p. 2.)

Unfortunately, signs of apparent progress were matched by troubling indications of an ominous shift in the Company's thinking. During a bargaining session on July 24, Lillie asked to speak privately with Canzano. He explained that management had sought a second opinion from a new set of lawyers and that those attorneys were advising the Company to fire the bargaining unit members. He told Lillie that, "he was afraid that he might be losing control of his client." (Tr. 228.) Unfortunately, Canzano chose to react to this news by chiding the management officials when the bargaining session reconvened. He took them to task, stating, "If you guys aren't any better at running the plant than you are at picking attorneys, I can see

²¹ Kirk did not attend the meeting. Winkle's testimony about the meeting did not address this point.

²² This purported inability to recall a significant conversation fit a pattern revealed in Kirk's testimony. His hesitancy and lack of recollection contrasted sharply with his overall presentation as an intelligent, engaged, and savvy corporate executive.

why you're having so many problems."²³ (Tr. 229.) Viar replied that the managers were "tired of being called stupid." (Tr. 230.) The meeting came perilously close to a breakdown, but the mediator's intervention averted this.

Kirk testified that, during this session, Lillie again was "reminding the Union that we think the strike is illegal and that we're not waiving our rights by meeting and discussing it." (Tr. 884.) He reported that Canzano replied by making an analogy to a sign posted in the coat room of a restaurant. Canzano explained that, even if the sign advised patrons that the restaurant was not responsible for missing articles of clothing, that did not make it so as a matter of law. Once again, I reject this testimony. The Company's detailed minutes of the meeting show a discussion about the merits of the parties' positions regarding unfair labor practices but fail to contain any statements by Lillie or others concerning the waiver of rights. (R. Exh. 4, pp. 22–33.) In this instance, I do not find that Kirk's testimony was deliberately inaccurate. Based on the testimony of various witnesses and the Company's minutes from another bargaining session on July 31, I conclude that the discussion referenced by Kirk actually took place on that date. Kirk's testimony is simply confused as to the date.

On July 25, the parties' intensive negotiations continued with both sides making major proposals. The Company proffered a complete package, including a settlement of existing unfair labor practice charges and the return to work of a portion of the work force. It characterized that work force as "strikers/locked-out employees." (GC Exh. 41, p. 2.) The Union responded with its own proposal that included what it viewed as a major concession. This consisted of an agreement to reduce the existing job classifications from 37 to 5.²⁴ At the bargaining session, there was lengthy discussion of these matters. There was no testimony indicating that the legality of the strike and the Company's position regarding that issue were discussed. The Company's minutes do not show any such discussion. (R. Exh. 4, pp. 34–35.)

Testimony about the next bargaining session that was held on July 28 raised additional disturbing questions about the veracity of the Company's witnesses. Viar asserted that the meeting began with a statement from Lillie in which he, "again reminded the Local Union that the strike was illegal, and that we were not waiving any of our rights or remedies under the Act." (Tr. 692.) Under cross-examination, Viar was forced to concede that the Company's minutes of this session contained nothing about this statement or the topic of the illegal strike. This is particularly revealing because of the authorship of those minutes. The Company's normal practice was to have the minutes taken by Diane Hedgecock, a human resources assistant. In this instance, Hedgecock was unavailable and the minutes were taken by Viar himself. If one were to assume that Hedgecock may not have understood the full significance of the illegal strike and waiver of rights issue, the same would certainly

not apply to Viar.²⁵ I have no doubt that, if Lillie had made the remarks asserted in Viar's testimony, he would have reflected those statements in his own minutes of the meeting. His testimony regarding this session is a particularly flagrant example of his lack of veracity.

The parties met again on July 31. The Union presented a complete proposal and the parties negotiated for 8 hours. Ultimately, the Company announced a change in its strategy and approach. Winkle testified that Lillie told the Union's negotiators that "the Company was no longer going to waive their rights under the law, and that it may terminate all the employees." (Tr. 132.) Canzano reported the contents of Lillie's warning as follows: "I just have something I have to say, and that is that, by continuing to bargain, the Company is not waiving its rights to fire people." (Tr. 240.) It was in response to Lillie's statement on this date that Canzano actually made the restaurant analogy that Kirk referred to as occurring on an earlier date. As Viar described it, Canzano said, "[J]ust because you say so doesn't make it true. Your assertion is similar to signs in a restaurant about not being responsible for lost clothing."²⁶ (Tr. 694.)

As has been the case throughout this discussion of what was actually said during negotiating sessions, the Company's minutes provide a useful reference. Unlike multiple other occasions where the minutes fail to support the Company's witnesses' claims regarding warnings of reservation of rights, in this instance Hedgecock's notes document the exchange. She indicates that Lillie told the Union that, "Employer not waiving any of their rights." She also noted Canzano's reply, "Just saying doesn't mean magic words. Issue about legality of strike in my opinion[,] legal opinion[,] no one knows the answer. Risk ain't worth it."²⁷ (R. Exh. 4, p. 44.)

²⁵ I am not suggesting that there is any reason to be concerned about Hedgecock's minutes of other sessions. Viar testified that she was "super" at taking the minutes and that her minutes were "copious." (Tr. 378.) At another point in his testimony, Viar commented that he "trusted implicitly" Hedgecock's ability "to get a clean record of what happened." (Tr. 612.)

²⁶ I feel compelled to observe that Canzano's analogy is imperfect. As the Union notes in its brief, one of the most striking features of this case is the fact that the Company never chose to put any reservation of rights regarding the illegality of the strike in writing. Canzano's hypothetical restaurateur posted his limitation of liability where patrons of the cloakroom could read it before hanging up their coats. All of this takes me back to my days presiding in small claims court where I had the opportunity to make the interesting excursion into the sometimes murky law of bailment as raised by the angry restaurant patron whose coat disappeared from the cloak room.

²⁷ The fact that Hedgecock recognized that this discussion was worthy of inclusion in the minutes of the meeting underscores the significance of the failure of her notes from other sessions to contain similar statements. If such statements had actually been made as claimed by the Company's witnesses, I conclude that Hedgecock would have made reference to them in her minutes. At trial, Hedgecock testified that she has reviewed all of her notes from the bargaining sessions and confirmed that they reflect that Lillie only addressed the illegality of the strike and the reservation of the Company's rights on May 21 and July 31.

²³ Canzano explained that his reference here was to the new attorneys, not to Lillie.

²⁴ The Company's position had been that the 37 classifications should be reduced to 3.

The July 31 meeting ended shortly after this ominous exchange. In the next days, the Company reached a decision regarding the bargaining unit members. It communicated that decision in several ways. On August 4, Attorney William Pilchak wrote to Canzano advising that his firm would be entering its appearance before the Board on behalf of the Company. He added:

As you know, the agreed-to 30-day cooling off period has expired. Douglas Autotec [sic] has thus come to final decision on its response to the illegal strike that was called on May 1, 2008, in violation of § 8(d)(3). Today, Douglas is mailing letters to the illegal strikers, notifying them that their employment with the company is formally terminated. [GC Exh. 26.]

As indicated by Pilchak, the Company did send letters to each of the members of the bargaining unit. The letters contained identical language. The key portion of that language was:

Because you participated in an illegal strike, you have lost any and all protection under the National Labor Relations Act, including any right to continued employment. Your employment with Douglas Autotech Corporation is terminated effective immediately because of your participation in the illegal strike of May 1, 2008 and thereafter.

(GC Exh. 47.) This letter was issued under Viar's signature.

Viar's testimony about this letter again serves to illustrate his lack of candor as a witness. In fact, it shows that he was willing to go to extreme and absurd lengths in his effort to bolster what he viewed as his Employer's legal defense. On his many trips to the witness stand, he consistently refused to acknowledge that his correspondence of August 4 was a termination letter. Instead, he always referred to it as, "the document that I sent to members of the bargaining unit confirming their status under the Act."²⁸ (Tr. 279.) Of course, this flies in the face of the plain language of his letter which could not be clearer in advising the bargaining unit members that "[y]our employment with Douglas Autotech Corporation is terminated effective immediately." (GC Exh. 47.) The absurdity of Viar's testimony on this point was dramatically underscored when he was confronted with an email that he wrote on the same day he signed the termination letters. In that email to his superiors, he stated, "Please see attached termination letter. I signed the individual letters this morning."²⁹ (CP Exh. 5.) Even after being shown this email, he continued to testify under oath that "I signed the letters, confirming the people's status under the

²⁸ See also many similar statements, including at Tr. 281, 334, and 337.

²⁹ Viar has not been hesitant about providing an accurate account of his actions on August 4 in contexts other than this litigation. For example, in an email to Sales Coordinator Amy Abrey on September 26, he stated, "Douglas terminated the striking employees as of August 4, 2008." He added that "[w]e are currently working on a retention/permanent hire package for the replacement workers and hope to have that tied up in the next several weeks." (CP Exh. 6.)

Act."³⁰ (Tr. 532.) All of this vividly illustrates the lengths Viar was prepared to go to serve his Employer's interests.³¹

On August 5, one of the Union's lawyers, Samuel McKnight, wrote to Pilchak, noting that the next bargaining session was scheduled for August 14 and asking if, "your August 4, 2008 letter mean[s] that the Company is canceling this bargaining session?"³² (GC Exh. 27.) Pilchak responded on the next day, advising McKnight that "[t]he Douglas bargaining team expects to attend the bargaining session scheduled for August 14, 2008." (GC Exh. 28.) On the same day, the Union filed the original unfair labor practice charge in this case, alleging that the Company had unlawfully discharged the bargaining unit members. (GC Exh. 1(a).)

The parties did gather for a bargaining session at a hotel on August 14. Attorney McKnight joined the Union's negotiating team for the first time. The Union's negotiators were informed by the mediator that the Company's officials were not going to meet with them. Upon hearing this, the Union's representatives went to the caucus room being used by the Company. McKnight asked the management team to engage in bargaining. Winkle testified that Lillie responded, "We're not going to come and bargain. All the employees have been terminated." (Tr. 138.) Kirk's testimony about this exchange was essentially to the same effect. He reported that McKnight asked Lillie, "Are you refusing to bargain with us?" (Tr. 893.) Lillie responded, "Sam, I know what you're trying to do. We will bargain with you on effects. And as far as an agreement for the people that are in there, we're not sure who represents them." (Tr. 893.) Kirk testified that Lillie's comment about the "people that are in there" was a reference to the replacement workers.

All of the witnesses agreed that there was no bargaining session on this date, nor has there been such a bargaining session at any time since August 14. On February 25, 2009, the Regional Director filed the original complaint and notice of hearing alleging the unlawful termination of the bargaining unit members and the refusal to bargain with the Union. As of the date of the conclusion of the trial in this case, the Company continues to refuse to employ any members of the bargaining unit and continues to refuse to discuss the terms and conditions of their employment with the Union.

³⁰ Viar was much more forthright in an email he sent to a transport company on a topic he described as the "Labor Situation at Douglas." In that communication, he explained, "Current Status Bargaining Unit—Douglas terminated the bargaining unit August 4, 2008. This matter has been referred to the National Labor Relations Board for resolution." (GC Exh. 51, p. 1.)

³¹ It should be noted that Viar's bizarre insistence that he did not fire the bargaining unit members in his letter to them dated August 4, is not endorsed by trial counsel for the Employer. Thus, in his answer to the complaint, counsel forthrightly states, "DAC [Douglas Autotech Corporation] admits that it discharged Charging Union members on or about August 4, 2008." (GC Exh. 1(h), p. 4.)

³² McKnight added that "[t]he strike ended unconditionally on May 5, 2008. The employees are locked out. If the Company discharges the employees, UAW Local 822 intends to do everything possible to hold the Company liable for this cruel and unlawful action." (GC Exh. 27.)

B. Legal Analysis

The General Counsel's central allegation of wrongdoing in this case is his contention that the Employer violated Section 8(a)(1) and (3) of the Act by discharging the bargaining unit employees on August 4 because they had participated in the strike that began on May 1. Ordinarily, there can be no doubt that participation in a strike is precisely the sort of concerted activity that is protected by the statute. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Unlike the run-of-the-mill unfair labor practice case, here, the Employer readily concedes that it did discharge the bargaining unit members due to their participation in that strike. See answer to the complaint, paragraphs 13 and 14. (GC Exh. 1(h).) Indeed, it could hardly fail to admit that it discharged the unit members due to their involvement in the strike given that it addressed letters to each of them specifically informing them that they were being terminated because they "participated" in that strike. (GC Exh. 47.)

The Company defends the legality of its decision to terminate the unit members due to their strike activities by asserting a defense arising under that portion of Section 8(d) of the Act which provides:

Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act.

There is no doubt that the Employer is correct in asserting that, under this provision, employees who lose their status due to participation in a strike conducted within the notice period may lawfully be subject to discharge for their misconduct. *Fort Smith Chair Co.*, 143 NLRB 514 (1963).

In reply to the Company's defense under Section 8(d), the General Counsel and the Union concede that the strike that began on May 1 violated the notice requirements of the Act and that the employees who participated in that strike suffered the loss of protected status specified in that subsection. They, in turn, rely on additional language contained in Section 8(d) as supporting the claim that the Company's decision to discharge the unit members was unlawful. Thus, after specifying that employees who strike in violation of the notice requirement lose their protected status, Section 8(d) adds a proviso limiting the duration of such deprivation of the Act's protection as follows:

[B]ut such loss of status for such employee shall terminate if and when he is reemployed by such employer.

The General Counsel and the Union forcefully contend that, on May 5, when the Company chose to impose a lockout of the bargaining unit members, it "reemployed" those members within the meaning of Section 8(d). Having been so reemployed, they regained the protection of the Act. As counsel for the General Counsel put it in his brief,

The Union's strike ended on May 5, when it unconditionally offered to return to work. In response, Respondent chose to lock out the unit employees "effective immediately" in support of its bargaining position. At that moment, the employees who joined the strike ceased to be illegal strikers and be-

came locked out employees entitled to the full protection of the Act. Respondent's decision to lock out the employees was an affirmative act that brought the strikers back within the protection of the Act.

(GC Br. at p. 9.) The Employer vigorously disputes this interpretation of the law, going so far as to characterize the General Counsel's theory as "silly" and an "absurdity." (R. Motion for Summary Judgment, at p. 9, GC Exh. 1(r).)

Interestingly, the lawyers for the opposing parties do appear to agree that the issue presented is, as counsel for the Respondent describes it, "a very important case of first impression." (R. Motion for Summary Judgment, at p. 7 fn. 3, GC Exh. 1(r).) To this, counsel for the General Counsel responds that "Respondent correctly states that this case appears to involve issues of first impression for the Board related to the interpretation of Section 8(d)." (GC Response to Motion for Summary Judgment, at p. 2 fn. 2, GC Exh. 1(s).) With all respect to these highly skilled trial attorneys, I do not agree with this view of the case. The Board has recently cautioned that, "every issue is one of first impression if characterized narrowly enough." *John T. Jones Construction Co.*, 349 NLRB No. 119, slip op. at 2 (2007) (not reported in Board volumes). I fear that this is what both counsel are doing here. In my view, this case may be properly decided by reference to principles of statutory interpretation directly applicable to Section 8(d) as articulated in precedents established by the Board and its reviewing authorities.

Because I believe that there are precedents and principles that govern the disposition of this controversy, I will begin my analysis by describing the broad picture before narrowing my focus to the particular facts established in the trial record. To begin with, it is appropriate to determine the correct allocation of the burden of proof. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001), citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948), the Supreme Court held that, under the Act, "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits" must be applied.

In this case, the Employer seeks to justify its conduct by reference to a special exemption from the prohibitions delineated in Section 8(a)(1) and (3). In fact, the Board has held that an employer who raises Section 8(d) as a defense bears the burden of proof. As it explained, "[b]ecause eligibility for the Act's protection is at issue, the burden of establishing these criteria and the resulting loss of protected status is properly placed on the party asserting it." *Freeman Decorating Co.*, 336 NLRB 1, 5-6 (2001).³³ As a result, the Employer in this case has the burden of proving that it was entitled to rely on Section 8(d) in defense of its decision to discharge employees for engaging in the strike.

³³ In an accompanying footnote to this quotation, the Board also specifically applied the holding in *Kentucky River* to parties "claiming the benefit of one of the recognized exceptions to Section 2(3)'s definition of protected 'employee.'" *Freeman Decorating Co.*, 336 NLRB at 6 fn. 23. This holding is also relevant to this case as will become apparent later in this decision.

It is next appropriate to examine the general principles of statutory construction that must be applied to the analysis of issues arising under Section 8(d) and related portions of the Act. Preliminarily, I must observe that even a casual reader of that subsection will conclude that it requires careful legal analysis.³⁴ It was enacted in 1947 as part of the Taft-Hartley Act. In the years that followed, judicial authorities repeatedly remarked on the difficulties involved in ascertaining its precise significance. Notably, Justice Frankfurter commented on “the ambiguity of Sec. 8(d)’s language [and] also the obscurity of its legislative history.” *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (opinion concurring in pertinent part). Because of these circumstances, Justice Frankfurter set forth an analytical methodology for use in resolving issues arising under Section 8(d). His methodology has been widely accepted and represents an excellent aid to the interpretation of the statutory language. As he put it, in light of the difficulties involved in understanding the subsection:

[I]t has thus become a judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.³⁵

352 U.S. at 297. I have attempted to apply this formulation to the problems presented in this case.

Naturally, the Board has also commented on the proper method of statutory interpretation to be applied to the opaque language in Section 8(d). Its leading case on the topic is *Fort Smith Chair Co.*, 143 NLRB 514 (1963). Indeed, *Fort Smith Chair* is the precedent that established the proposition relied on by the Employer in this case, that strikers may be discharged for violating the notice provisions of the subsection. The Board adopted the general approach outlined by the Supreme Court and added that “it seems obvious to us that the various parts of Section 8(d) here involved must be read together in order to create an effective and consistent statutory means for achieving the purpose of the section.” 143 NLRB at 518–519.

With this methodology in mind, I will now examine those precedents that speak directly to the facts established in this record. In my view, the first and perhaps most significant of these is the Supreme Court’s holding in a case decided shortly before *Lion Oil*, supra. In *Mastro Plastics Corp. v. NLRB*, 350

U.S. 270 (1956), the issue is easily framed. The Court was called on to decide whether the loss of status provision of Section 8(d) applied to unfair labor practice strikers. It must be recalled that the subsection, by a plain reading of its terms, would seem to apply to such strikers in the same manner as it would affect economic strikers.³⁶ Nevertheless, the Court reached a contrary result based on its assessment of the context of the subsection and its relationship to the entire Act. It adopted the Board’s reasoning that, since the objective of the strike was not to terminate or modify the parties’ collective-bargaining agreement, “the loss-of-status provision of § 8(d) is not applicable.” 350 U.S. at 360. This holding was premised on the determination that the purposes underlying the notice provisions would not be advanced by application of the loss-of-status provision to an unfair labor practice strike.

As the Board has explained in this connection:

In several different contexts, the [Supreme] Court has construed the section narrowly, noting that “we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” Indeed, in *Mastro Plastics* . . . the Court specifically interpreted the loss-of-status provision not to affect employees who engaged in an unfair labor practice strike within Section 8(d)(1)’s 60-day notice-to-employer period, even though the latter provision makes no exception for unfair labor practice strikes.

Freeman Decorating Co., supra, 336 NLRB at 7. Clearly, *Mastro Plastics* stands for the proposition that I must not simply take the words of Section 8(d) literally or apply them mechanically. Instead, it is necessary to search for the appropriate meaning of the statutory language by reference to the overall statutory scheme and the Congressional purposes under girding it.

It is now time to turn to an examination of the specific events of this controversy as established by the credible testimony and documentary evidence in order to apply the broad principles to them. It is clear that, on May 1, the Union commenced an economic strike in violation of the notice provisions of Section 8(d). I credit the testimony of Winkle that this violation was inadvertent and that the leadership of the Union was completely unaware of the violation at the time the strike began. As I have previously indicated, the Board determined the precise legal effect of a union’s negligent failure to comply with the statute in *Fort Smith Chair*, supra. In affirming the Board’s conclusion that the employer in that case was entitled to discharge the unlawful strikers, the D.C. Circuit observed:

The Board held that this failure [to notify mediation services] rendered a strike by the union unlawful, and that the striking employees thereby became vulnerable to lawful discharge by the employer. In so holding, the Board did, in our view, re-

³⁴ As the D.C. Circuit succinctly characterized the matter, “In the first place, there are no ‘plain words’ of Section 8(d). The Supreme Court has recognized that the section ‘is susceptible of various interpretations.’ *Retail Clerks Local 219 v. NLRB*, 265 F.2d 814, 817 (D.C. Cir. 1959). (Citation omitted.)

³⁵ Justice Frankfurter’s analysis was entirely consistent with that of Chief Justice Warren who authored the Court’s opinion in *Lion Oil*. While the precise issue arising under Sec. 8(d) in that case has no bearing on the matter before me, the Court’s discussion of the proper approach to statutory construction certainly does apply. The Chief Justice observed that it was necessary to avoid “a narrowly literal construction of the words of the statute.” 352 U.S. at 334. He went on to warn that any interpretation of the language made in isolation from the context should be avoided and that the proper approach was “to look to the provisions of the whole law, and to its object and policy.” 352 U.S. 334. (Citation omitted.)

³⁶ Indeed, the dissenting justices premised their conclusion on exactly this point. They noted that “giving the ordinary meaning to what Congress has written” would require the application of the subsection to unfair labor practice strikers. 350 U.S. at 293. For them, it was enough to say that “[w]e need not agree with a legislative judgment in order to obey a legislative command.” 350 U.S. at 298.

flect accurately the Congressional purposes; and we affirm its order.

Furniture Workers v. NLRB, 336 F.2d 738, 742 (D.C. Cir.), cert. denied 379 U.S. 838 (1964). From this it is clear, for example, that had the Employer discharged the bargaining unit members during the duration of the ongoing strike from May 1 to 5, there would be no legal basis to challenge that decision.³⁷

The evidence reveals that it was brought to Winkle's attention on the afternoon of May 2 that the strike was illegal because the notice had not been filed. On the next day, Winkle conferred with the other leaders of the Union. They decided that the proper corrective action was to recommend to the membership that they terminate the strike by making an immediate and unconditional offer to return to work. A meeting of the unit members was convened on the following day and the members voted to terminate the strike in the manner proposed. Early in the morning of the succeeding day, the Union conveyed its unconditional offer to return to work to the Employer by written communication and by the act of having the complement of strikers assigned to the morning shift at the plant actually report to that location so as to be immediately available for work.

In his brief, counsel for the Employer is critical of the Union's leadership for failing to end the strike earlier. (See R. Br. at p. 6.) I do not find this to be a fair criticism. The evidence reflects that Winkle learned of the problem on the second day of the strike. He met with the Union's leadership on the third day. They met with the membership on the fourth day and presented the Company with an unconditional offer to return to work on the morning of the fifth day. Given the realities involved in the process of collective decisionmaking in our form of industrial democracy, this timetable strikes me as entirely reasonable. The relatively brief delay occasioned by the Union's internal deliberative process is not indicative of bad faith or any desire to prolong its illegal strike. To the extent that Section 8(d) may properly be viewed as expressing a Congressional intent that any inadvertently commenced illegal strike be brought to an end expeditiously, I conclude that the Union has acted consistently with such a policy goal. As a consequence of its prompt action, the disruption of commerce caused by its illegal strike was brought to a conclusion. In addition, by presenting its unconditional offer to return to work and by filing its belated F-7 form with the FMCS, the Union took effective steps to remedy the failure to enlist the mediation services mandated by the statute. This is well illustrated by the fact that, in a letter dated May 7, the FMCS notified the parties that it had assigned a mediator to assist them.³⁸

³⁷ To be even more specific, the Union's unlawful conduct gave the Employer a "license to discriminate." *Freeman Decorating Co.*, supra, 336 NLRB at 11. In *Freeman*, the Board made it abundantly clear that an employer's decision to discharge such unlawful strikers was privileged even if it was entirely based on an otherwise unlawful motivation to eliminate the union from its workplace.

³⁸ Of course, the Union's prompt actions could not, and did not, eliminate all of the adverse consequences of the illegal strike. I recognize that the disruption of the Company's operations on May 1 had the type of negative impact feared by Congress. The fact remains, how-

As I have indicated, during the duration of the illegal strike, the Company would have been privileged to terminate the strikers from its employ. It is essentially undisputed that its management did not take this action during the strike.³⁹ Upon being presented with the Union's unconditional offer to return to work early in the morning of May 5, the Company's negotiators spend much of the day working on their response. The response that they selected was conveyed to the Union by the hand-delivered letter presented at the meeting of the parties that evening. This letter specifically acknowledged the Union's "request to return from the strike." It also acknowledged that, "[t]he offer to return to work was unconditional." It went on to announce the immediate commencement of a lockout "in support of [the Employer's] bargaining position." Finally, it concluded by asking the Union to notify the Employer of its response, making the rather telling observation that such notification is required so that "when an Agreement has been reached . . . employees can be expeditiously returned to work." (GC Exh. 8, p. 1.) Given that language, it is obvious that the Employer did not take any action to terminate its employment relationship with the bargaining unit members.

A number of very important consequences flow from the Employer's choice of response to the illegal strike as embodied in its letter to the Union. Indeed, virtually every sentence in its letter is fraught with significance in the law of labor relations.⁴⁰ First, the letter acknowledged that the Union was making an unconditional offer to return to work. This acknowledgment embodies a recognition that certain consequences will follow. As the Board has explained, "[i]t is well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided their positions have not been filled by permanent replacements." *Hansen*

ever, that upon learning of its error, the Union took prompt and reasonable steps to minimize those adverse consequences.

³⁹ I suppose one could contend that Viar's tenacious insistence that the Company's termination letter on August 4 was merely a recognition of the former strikers' loss of status under the Act constitutes a claim that the Employer was not required to take any specific action to discharge the strikers during the pendency of their strike. Counsel for the Company does not make such an argument and he is correct in refraining from doing so. The Board has clearly noted that there is a distinction between loss of status under the Act and loss of employment. In *Correctional Medical Services*, 349 NLRB 1198, 1200 (2007), it explained that "an 8(d) striker loses status as an employee of the employer, irrespective of whether the employer takes the ultimate step of discharge." In a case that I will discuss in more detail later, the Sixth Circuit underscored this point, observing that "Section [8(d)] does not mandate the discharge of any individual participating in an illegal strike, it merely deprives that individual of certain statutory rights The employer then has the discretion to either discharge or retain the employee." *Shelby County Health Care Corp. v. State, County & Municipal Employees Local 1733*, 967 F.2d 1091, 1096 (6th Cir. 1992).

⁴⁰ I have no doubt that the Company's decision makers, Viar, Kirk, and Lillie, were well aware of the importance of each sentence in the letter they presented to the Union. Two of them were labor lawyers and all of them had extensive experience in labor relations. On its face, the wording of the letter, filled as it is with terms of art, demonstrates an awareness of the significance of its statements in the context of labor law.

Bros. Enterprises, 279 NLRB 741 (1986), enf. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987).

It is clear that the Company was well aware of the likely legal effect of a recognition that the Union had made an unconditional offer to return to work. In the next sentence following its acknowledgement of the unconditional offer, the Company invoked one of the few recognized exceptions to the rule set forth in *Hansen*. By announcing its lockout of the bargaining unit employees, the Employer was choosing a response to the potential obligation to reinstate those employees that has been authorized by the Board. In *Ancor Concepts, Inc.*, 323 NLRB 742, 743 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999), the Board described this exception to the immediate reinstatement requirement:

An employer may refuse to reinstate economic strikers on their unconditional offer to return to work based on the legitimate and substantial business reason of a lawful economic lockout in support of a legitimate bargaining position. [Internal quotation marks and footnote omitted.]

The Employer's response to the Union's offer to unconditionally return to work must now be assessed within the context of Section 8(d) and related portions of the statute. It is highly useful to begin that evaluation by considering the persuasive reasoning brought to this question by the Sixth Circuit in *Shelby County Health Care Corp. v. State, County & Municipal Employees Local 1733*, 967 F.2d 1091 (6th Cir. 1992).

In *Shelby*, supra, union members engaged in a strike that violated the notice provisions imposed on employees in health care occupations by Section 8(d). Such a violation leads to the same loss of protected status experienced by the strikers in this case. The employer chose to reach a settlement of the strike with the union by which certain employees would become subject to disciplinary action for their participation in the strike. The settlement agreement also provided that disputes arising from the imposition of such discipline would be resolved by resort to the parties' normal grievance and arbitration process. Such a dispute did arise when the employer terminated an employee for participation in the strike. This was eventually submitted for arbitration. The arbitrator ruled in favor of the former illegal striker, directing that the employee be reinstated. The employer filed suit to overturn the result of the arbitration.

In rejecting the employer's lawsuit, the Sixth Circuit made a persuasive exposition of the meaning of Section 8(d) in the context presented in the case before me. The court noted that Congress had made an intentional policy choice with regard to the appropriate response to a union's violation of the notice requirements. As the court explained, Congress declined to directly impose any sanction on the illegal strikers. Instead, it vested discretion to respond in the hands of the employer who was victimized by the unlawful strike.⁴¹ As the court described,

The statute allows the [employer] to do what it wants to with illegally striking employees by withdrawing the statutory rights of those employees. The [employer] could terminate them or it could invite them all back to their jobs without consequence. In addition, under the principle that the greater power includes the lesser, the [employer] could decide on some compromise solution as it did here The matter is left to the discretion of the employer, and the statute itself says nothing about how this discretion should be exercised.

967 F.2d at 1096–1097. Of the greatest significance for the present case, the court also makes the following observation, “[b]ut once the employer decides not to discharge the employee, that employee is once again brought under the protective mantle of the NLRA.” 967 F.2d at 1096.

In my view, the analysis in *Shelby* serves both to explain what happened on May 5 and to mandate the legal impact of those events. On that date, the Company's officials made a reasoned decision as to the nature of the Employer's response to the Union's illegal strike and subsequent unconditional offer to return to work. Eschewing the extreme alternatives of granting an immediate return to work or firing the strikers, the Company elected to impose a lockout. This choice represented a middle course or, in the words of *Shelby*, a “compromise solution.” This response was clearly permissible under the Act. By the same token, the invocation of this response inexorably led to the restoration for the illegal strikers of “the protective mantle of the NLRA.”

Naturally, I recognize that, at least at this stage of the proceedings, the Sixth Circuit, no matter how persuasive its reasoning, does not represent mandatory authority. Therefore, it is vital to examine the Board's own precedents. As I will now explain, those precedents are entirely consistent with the reasoning expressed in *Shelby*.⁴² In particular, there are two cases that directly address the problem presented here. The General Counsel relies heavily on *Fairprene Industrial Products Co.*, 292 NLRB 797 (1989), enf. mem. 880 F.2d 1318 (2d Cir.), cert. denied 493 U.S. 1019 (1990). In my view, such reliance is entirely justified. In contrast, the Employer strongly urges that *Boghossian Raisin Packing Co.*, 342 NLRB 383 (2004), supports its position in this case. While I agree that *Boghossian* is plainly relevant, I conclude that there are critical differences

in the case presently before me. The Company concluded that the response that made the most economic sense was to lockout the former illegal strikers and use that lockout as a powerful weapon in the contest of wills that would dictate the future course of the parties' collective-bargaining relationship.

⁴² It should be noted that the Board, in addition to granting an employer that has been victimized by an illegal strike the wide range of discretion described in *Shelby*, has also authorized the employer to seek relief through its own unique enforcement mechanisms. In *Freeman Decorating Co.*, supra., 336 NLRB at 4 fn. 15, the Board noted that a union that calls a strike in violation of Sec. 8(d), at the same time, violates its duty to engage in collective bargaining as required by Sec. 8(b)(3). This view affords employers an additional remedial mechanism designed to provide injunctive relief against any repetition of a union's unfair labor practice involved in conducting a strike that violated the provisions of Sec. 8(d).

⁴¹ In my view, that policy choice was entirely consistent with the overall statutory scheme regulating labor relations in our free market economy. It afforded freedom of action to the private party who was in the best position to determine the response that was in its own economic self-interest. It is clear to me that this is precisely what occurred

between the conduct of the parties in that case and the behavior of both the Union and the Company here. Those highly material differences account for the difference in result that I reach in this matter.

Turning first to *Fairprene*, the union began a strike on April 1. That strike was commenced in violation of the notice requirements of Section 8(d). The parties negotiated with each other during the strike in an effort to resolve the dispute. The administrative law judge found that the negotiations resulted in an agreement that the bargaining unit members would accept the employer's final prestrike offer, that all strikers would be returned to work, and that no reprisals would be taken against any of those strikers. Upon written notification by the union that this agreement was accepted, the strike ended at 8:30 a.m. on April 3. At approximately 10:30 a.m. on that day, management learned that the strike had been illegal. Three hours later, the employer discharged 15 of the former strikers by letter stating that they were terminated due to their participation in the illegal strike.

The trial judge found the discharges to be made in violation of Section 8(a)(3) and (1) of the Act. He relied heavily on what he characterized as the "able brief" filed by counsel for the General Counsel.⁴³ 292 NLRB at 802. The judge noted that the General Counsel conceded that the strikers had lost the protection of the Act and could have been discharged. However, she argued that,

when the Company agreed to reinstate all the strikers and the Union agreed to end the strike, the strikers at that point had been "reemployed" within the meaning of Section 8(d). The statute does not require that the employees return to work to regain employee status. Therefore, the strikers once again became statutory employees.

....

The sanction of loss of employee status provides a powerful incentive for labor organizations to provide the notice mandated under Section 8(d)(3). The involvement of mediation services is intended to encourage the peaceful resolution of labor disputes. However, once the parties have resolved their dispute, as the parties in this case had, no further statutory purpose is served by allowing employers to exercise this punitive power. Once an unlawful strike has ended, there is no longer any reason to deprive employees of the protections of the Act. [292 NLRB at 802.] [Internal punctuation omitted.]

Applying this reasoning, the judge concluded that:

The Company waited too long to discharge the strike participants. Section 8(d) provides that the "loss of status" for the employee "shall terminate if and when he is reemployed." I find, in agreement with the General Counsel, that when the full strike settlement agreement was reached and the Company scheduled the employees to return to work, the strike

ended and the strikers were "reemployed" within the meaning of that section's provision. [292 NLRB at 803.]

The employer took vigorous exception to the judge's decision.⁴⁴ On review, the Board affirmed that decision without any additional discussion.⁴⁵

What can one learn from *Fairprene* that will be material to the outcome of this case? In the first place, *Fairprene* reflects the same view of Section 8(d) as that articulated more fully by the Sixth Circuit in *Shelby*, supra. When confronted with an illegal strike, an employer is vested with the full discretion to frame its response. It may choose to discharge the strikers or it may select an alternative approach. If it selects such an alternative, as the employer in *Fairprene* chose to do, it cannot renege on that choice. By selecting an alternative, the strike has ended and the strikers have regained the protective mantle of the Act. I can perceive no difference in this regard between an employer's selection of a settlement agreement or its invocation of the economic weapon represented by a lockout. In either case, the strike has ended and the strikers are again under the Act's protection. Any subsequent unlawfully motivated discharge will violate the law.⁴⁶

The second lesson of *Fairprene* is that, through application of the principles of statutory construction relevant to analysis of Section 8(d), the term "reemploy" as used in that subsection must be given a broad construction designed to harmonize with the entire language of the Act and to advance the policies embodied in the Act. Thus, in *Fairprene*, the Board rejected the contention that the former strikers had not been reemployed because they had not yet resumed their jobs in the plant. In my view, the Board's conclusion in this regard is consistent with the appropriate principles of statutory construction. Consideration of the entire context demonstrates that Congress did not intend a narrow meaning of the term "reemploy."

While I certainly agree with Judge Learned Hand's famous admonition to avoid making "a fortress of the dictionary," I do think the dictionary may function as the sentry box outside the gates of that proverbial fortress. If the proffered meaning of a word contained in a statute cannot pass the preliminary test represented by the dictionary, it ought not enter the fort. The Company argues that, because it did not "bring the illegal strikers back to work," it could not have reemployed them. (R. Br.

⁴⁴ I base this conclusion on the fact that the company pursued its appeals all the way to the Supreme Court.

⁴⁵ In *John T. Jones Construction Co.*, 349 NLRB No. 119, slip op. at fn. 3 (2007) (not reported in Board volume), the Board explained that when, on review of exceptions filed by a litigant, it chooses to adopt a judge's decision without comment, this "necessarily means that the Board rejected the respondent's exceptions and agreed with the judge's finding, and indicates that the Board had nothing to add." Interestingly, the strength of the judge's reasoning is underscored by the fact that the Second Circuit also chose to affirm the decision without any additional commentary. Finally, it bears mentioning that the Supreme Court declined to hear the case.

⁴⁶ Indeed, the Board's conclusion that *Fairprene* violated the Act by discharging former strikers on the day the strike ended certainly underscores that the same result would apply to this Employer who discharged former strikers fully 3 months after the strike ended and the lockout commenced.

⁴³ If labor lawyers even wonder whether their posttrial briefs make any difference to the outcome of cases, *Fairprene* should put their minds at rest. Counsel's powerful arguments clearly affected the outcome of that case. Twenty years later, they also resonate with me.

at p. 31.) In my view, this confuses the narrow concept of being engaged in some act of labor with the broader meaning of employment as representing a relationship between the employer and the employee. To illustrate, if I have a ruptured appendix, I will seek the aid of a surgeon to extract it. When the physician does so, he or she is performing labor for me and will expect to receive compensation from me. Despite this, neither the doctor nor I would contend that by this process he or she has become my employee or that I have become their employer. On the other hand, while I spend a month on sick leave recuperating from the surgery, I will perform no labor. Despite this, both my employer and I will readily agree that I remain employed in my current position. Thus, it can be seen that in the ordinary understanding of the term, “employment” is both something less than, and something much more than, the mere provision of labor for pay. At its heart, it represents an ongoing economic relationship. To suggest that Congress chose to use the term, “employ,” in a severely limited sense involving only the actual provision of labor is to do violence to the fundamental dictionary meaning of the term that best fits within the context of the entire statute and the purposes described in it.

The use by Congress of a broad definition of employment clearly embodies the idea of an ongoing relationship.⁴⁷ It is interesting to observe that this understanding of the meaning of the term goes back to the very origin of the English word, “employ.” It derives from the Latin, “*implicare*,” meaning to enfold or involve. See www.merriam-webster.com/dictionary/employ. Thus, even at its origin, it encompasses the idea of an ongoing relationship. This understanding is reflected in the Board’s 8(d) jurisprudence as well. For example, in *Freeman Decorating Co.*, supra, 333 NLRB at 6–7, the Board observed that, “Section 8(d) must contemplate a definite relationship, if it is to be meaningfully applied.” The Board further characterized that relationship as involving “reciprocal rights and duties.” Thus, the concept of employment is not defined by the simple act of one person performing labor for another person. It consists of a far broader relationship.

Ultimately, I base my conclusion that the term “reemploy” as used in Section 8(d) stands for something far more complex than the simple furnishing of labor to another by consulting a second important provision of the Act. Section 2(3) defines the term, “employee.” Given that both words share the same root, it is obvious that there exists a direct and compelling significance to the Congressional definition of “employee” in assessing the meaning of “reemploy.” In pertinent part, that definition is as follows:

The term “employee” shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute.

⁴⁷ As counsel for the Union observes, Congress could have chosen language to indicate a far more restrictive intent. As he aptly describes it, “in § 8(d) of the Act, Congress did not choose words such as ‘rehire’ or ‘return to work’ or ‘return to job’ or ‘reinstate.’ Congress chose reemployed. ‘Reemployed’ is a derivative of ‘employee’—a concept under the Act which is broad enough to embrace . . . replaced workers, applicants for employment, hiring hall registrants, and locked out workers.” (CP Br. at p. 4.)

In *Freeman*, supra, the Board took note of this statutory definition when assessing the meaning of Section 8(d). It observed that “[i]t has long been recognized that Congress made the definition of ‘employee’ expansive in order to protect individuals in contexts outside direct employment relationships.” 333 NLRB at 5 fn. 20. (Citations omitted.)

When one applies the statutory definition of “employee” to the facts of this case, the outcome is apparent. On May 5, the Union ended its unlawful strike. On the same day, the Company announced a lockout. When the Company chose to terminate the former strikers on August 4, the persons being discharged were “individual[s] whose work has ceased as a consequence of, or in connection with, [a] current labor dispute,” to wit: the lockout announced on May 5. It follows that the persons discharged on August 4 were statutory “employees” at the time of their discharge, having been “reemployed” by their employer when it announced the lockout on May 5. As a result, those former strikers were entitled to the protection of the Act at the time of their discharge. This outcome is entirely consistent with the result in *Fairprene*. In both situations, formerly illegal strikers were afforded the Act’s protection once the strike had ended, despite the fact that they had not yet resumed performing actual labor for the employer.

Apart from being consistent with applicable Board precedent, this result also comports with common sense within the context of labor law. The Company has never provided a satisfactory answer to the most elementary question posed by this case. When it announced its lockout on May 5, who was being locked out? Obviously, strangers were not the subjects of the lockout, nor were discharged former employees. The only true answer to this query is the one provided by Justice White in his concurring opinion in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 321 (1965), “[a] lockout is the refusal by an employer to furnish available work to *his regular employees*.” [Emphasis added.] Put yet another way, I agree with counsel for the Union’s observation that, “locked out employees can only be locked out from something—i.e., employment by the Company.” (CP Br. at p. 21.) (Boldface omitted.)

I recognize that the Employer raises additional defenses beyond its central argument that it had not reemployed the strikers by the act of imposing its lockout. For example, the Company contends that if it had known that the strike was in violation of Section 8(d), “DAC could have immediately terminated the illegal strikers.” (R. Br. at p. 24.) This argument must fail for reasons of both law and fact. As to the law, the simplest answer is that this was the precise claim urged by the employer in *Fairprene*, supra. It will be recalled that it was only after management had already agreed to terms of a settlement that it learned that the strike had been unlawful. Immediately upon gaining this knowledge, the employer discharged illegal strikers. Neither the Board nor the Second Circuit accepted such ignorance as a defense.⁴⁸

⁴⁸ There is nothing particularly harsh in the Board’s position. In other cases, management officials have had no difficulty in dealing with this issue. For example, in *Boghossian Raisin*, supra, counsel for the employer contacted the FMCS before the strike began. Within 35

More importantly, the facts of this case demonstrate that the Company was not ignorant of the situation. While some of the Employer's witnesses attempted to dance around the issue of the precise state of their knowledge, this was a rare instance when Viar gave a forthright account. It will be recalled that he testified that, prior to the drafting of the letter to the Union announcing the lockout, Lillie had asked him to search for the notice in the Company's files. When he was unable to locate it, "we had a discussion about the potential impact of that 30-day notice not being in the record." (Tr. 709.) As he put it, "[I]t was fishy. Where's the mediator? Oh yeah, where's the mediator?" (Tr. 638.) In sum, Viar testified that management, "[s]uspected, surmised, we knew something, as I've testified, was wrong because I couldn't find it." (Tr. 709.) As Viar himself explained, the absence of the notice in the Company's files, coupled with the peculiar lack of contact from FMCS, led management to reasonably conclude that the strike had been undertaken in violation of the notice requirement. Based on this, I find that management's decision to respond to the unconditional offer to return to work by imposing a lockout rather than by discharging the strikers represented a knowing and reasoned determination based on the Company's assessment of its own economic self-interest.

The second argument raised by the Employer concerns the need to address the legal effect of its express statements to the Union consisting of a reservation of its rights with regard to the illegal strike. In the first instance, I agree with counsel for the Company that there may be circumstances where the Board should give effect to an employer's reservation of rights. If an employer has a genuine doubt about the notice issue and is seeking a brief period in which to obtain the required information, it makes sense to permit it to reserve its rights before formulating a response to the Union's behavior. Nevertheless, in my view, this is not such a case.

In the first place, this Employer did not attempt to gain additional time to make a decision through the means of a reservation of rights. Under its asserted view of the evidence, it reserved its rights at the same time it announced its lockout. For the reasons explained by the Sixth Circuit in *Shelby*, supra, this it could not do. Once it exercised the wide-ranging discretion afforded to it in Section 8(d) by choosing a response to the Union that did not include termination of illegal strikers, it was bound by its choice. By declining to terminate those strikers, it acceded to their resumption of protected status under the Act. Thus, while it may have been appropriate for the Company to withhold any response to the Union through a reservation of its rights, even by its own account, it did not do so. Instead, it chose the proverbial course of having its cake and eating it too. This it could not do.

More importantly, I have previously engaged in a lengthy analysis of the issue of whether the Company made any reservation of rights at the crucial May 5 meeting. For the reasons explained, I found that the evidence strongly demonstrated that the Company's witnesses had fabricated this claim and that such a reservation of rights was not made at the meeting.

minutes of the commencement of the strike, he informed the union that their strike was illegal.

While such statements reserving rights were made in two subsequent meetings, they came far too late to have any effect. As I have already explained, I also place particular weight on the absence of any written reservation of rights. This stands in sharp and illuminative contrast to the situation in *Boghossian Raisin*, supra, the case most heavily relied on by the Employer. In that case, while the illegal strike was ongoing, counsel for the employer made an oral representation to the union that the company was "reserving all options . . . up to and including discharge." 342 NLRB at 384. He immediately followed this with a written statement to the union advising that the company, "still reserved its right to terminate all the strikers and would do so unless the Union provided documentation the following day that the strike is legal. Id. at 384. (Quotation marks omitted.)

While on the subject of *Boghossian Raisin*, this is an appropriate point to assess the Company's claim that this case supports its own legal position. Its counsel asserts that "[i]n *Boghossian Raisin*, the NLRB has already resolved the issues presently in dispute." (R. Br. at p. 2.) While I agree that *Boghossian* has much to say about the proper disposition of this case, a careful examination of the factual context reveals critical differences in the behavior of both the union and the employer that readily explain the differing outcome that I reach in deciding this matter. I have already noted that management in *Boghossian* acted with vigor and clarity. To begin with, as in the case before me, the union had filed and served the so-called 60-day notice of intent to terminate the collective-bargaining agreement. Also similar to this case, the union neglected to file and serve the 30-day notice. Grasping the potential significance of the company's receipt of one notice but not the other, counsel for the employer in *Boghossian* immediately contacted the FMCS. As a result, he was able to inform the union of the illegality of its strike with 35 minutes of the commencement of the job action.

When the union failed to make an unconditional offer to return to work, counsel for the employer made oral and written statements reserving the company's right to discharge the illegal strikers. In a striking parallel between *Boghossian* and the instant case, the key events between labor and management occurred on the fifth day of each strike. In the present case, management used the meeting held on that day as the opportunity to formally announce a lockout of the bargaining unit employees. In *Boghossian*, management also made its decision, exercising the discretion afforded to it by Section 8(d). It sent termination letters to the illegal strikers. By comparison, it will be recalled that the Employer in this case did not issue such termination letters until 3 months later.

If the employer's behavior in *Boghossian* represented the essence of prompt and effective exercise of its rights under Section 8(d), the union's behavior demonstrated incomprehension of, or obstinate unwillingness to conform to, the legal requirements imposed on it by that subsection. After being informed that their strike was illegal, union officials insisted that the illegal strikers would only return to work, "on the basis of the Company's last, best and final offer at the bargaining table." 342 NLRB at 384. In upholding the legality of the employer's decision to terminate the strikers, the Board's majority cited the

union's "failure to meet its obligations and its persistence with the strike after learning of its error." *Id.* at 385. It reemphasized the point, observing that, "very significantly, as mentioned above, after learning of its error, the Union failed to unconditionally cease and desist from its unlawful actions." *Id.* By way of revealing contrast, in this case, the Union took timely action to transmit a written, immediate, and unconditional offer to return to work accompanied by the appearance of the day-shift employees at the facility as a demonstration of the genuine nature of its response to the situation. Interestingly, these were precisely the actions that the *Boghosian* Board had indicated should have been taken by the union in that case. As the Board put it, "Upon acquiring this information [regarding the illegality of the strike], the Union did not promptly call an unconditional end to the strike and have the strikers report for work." *Id.* at 386.

In the present case, the Union followed the Board's template to the letter. On the other hand, the Employer utterly failed to take the prompt and clear action to terminate the illegal strikers that had been approved by the Board in *Boghosian*. It failed to reserve any rights, instead electing to reply to the Union's decision to terminate the illegal strike by imposing a lockout. As a consequence, it conclusively exercised its option in responding to the 8(d) violation and reemployed the bargaining unit for purposes of that subsection. Over the course of the next 3 months, after choosing to engage in negotiations with the Union while continuing operations with the replacement work force, it ultimately made a tardy decision to terminate the former strikers. Those former strikers, having regained their protected status months earlier, were unlawfully discharged. On full and careful consideration, I cannot conclude that *Boghosian* provides any justification for the Company's actions in this case.

I note that the Employer raises other defenses related to the nature and timing of its decision to lock out the bargaining unit members on May 5. In the first place, the Company argues that it was forced to announce the lockout on May 5 because a failure to make a response to the Union's unconditional offer to return to work on that date may have been considered unlawful in light of the Board's holding in *Eads Transfer*, 304 NLRB 711 (1991). (See R. Br. at p. 32-33.) Examination of *Eads Transfer* does not support counsel's position. It is true that the essence of the Board's holding in *Eads* was that an employer must make a "timely announcement" of a lockout in response to an unconditional offer to return to work. 304 NLRB at 712. Of course, whether a lockout announcement is timely depends on the entire circumstances. In *Eads*, the employer refused to reinstate the strikers and also refused to explain its behavior. For a full 2 months, it simply did nothing to respond to the union's offer. Naturally, the Board concluded that this behavior was unlawful. It is a vast and unjustified leap to assert that *Eads* would require this Employer to impose an immediate lockout despite its purported desire to investigate the notice issue before taking any action. Had the Employer chosen to inform the Union that it was reserving its decision under Section 8(d) until it had concluded a prompt investigation of the Union's compliance with that subsection, there would have

been no violation of the *Eads* requirement for a timely response to an unconditional offer to return to work.

Finally, counsel for the Company contends that the Union's response to the lockout demonstrates that the offer to return to work made on May 5 was actually "a feigned unconditional offer." (Tr. 587.) As counsel described it, "When they [the Union] were given the conditions upon which they could come back into the plant, they said no. The strike never ended." (Tr. 588.) Under counsel's theory, by making an "unconditional" offer to return to work, the bargaining unit members were agreeing to come back to work under any set of terms and conditions management desired. Thus, counsel would appear to contend that if management offered a return to work at minimum wage, the unit members were obliged to comply. This cannot be the state of the law.

In fact, the Board has explained the actual state of the law in *Boghosian*, where it observed:

Of course, should the employer accept their offer to return to work (effectively foregoing its 8(d) position), then and only then would it have to offer them work under the extant terms, absent a lawful impasse and unilaterally implemented new terms.

342 NLRB at 383 fn. 6. In this case, there has never been a contention that the parties were at lawful impasse. Indeed, they continued to meet and bargain regularly for the next 3 months. As a result, the only offer from the Employer that the Union was legally obligated to accept was an offer to return to work "under the extant terms" of their employment. Since the Company never made such an offer, there is no evidence whatsoever that the Union's original unconditional offer was other than genuine.⁴⁹

In conclusion, for the reasons just presented in detail, I conclude that the Union engaged in an unlawful strike from May 1 to 5. Under the grant of authority set forth in Section 8(d), the

⁴⁹ To be sure, the Union did refuse to agree to end the lockout by accepting the Employer's so-called "bargaining position" as contained in its written lockout materials. (GC Exh. 8, p. 1.) This raises a different issue. While the General Counsel has never alleged that the Employer's lockout was unlawful, I cannot help but observe that it does not appear to meet the Board's standards for lawful lockouts. As the Board held in *Dayton Newspapers, Inc.*, 339 NLRB 650, 658 (2003), *affd.* in relevant part 402 F. 3d 651 (6th Cir. 2005), "a fundamental principle underlying a lawful lockout is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement." The Board elaborated by explaining that, the locked out employees "must be clearly and fully informed of the conditions they must meet to be reinstated." 339 NLRB at 658. Because the employer in *Dayton* presented the union with a "moving target," the lockout violated Sec. 8(a)(3) of the Act. 339 NLRB at 658. By the same token, the company's lockout letter and accompanying materials never provided a clear statement of the terms and conditions that must be accepted to end the lockout. As I explained earlier in this decision, by its own terms the materials were incomplete and even the Company's own negotiators were unable to explain exactly what the Union would have been required to accept in order to return to work. See *supra* at fn. 19. It is hardly surprising that the Union never "accepted" the Company's so-called bargaining position.

Employer was vested with broad discretion to frame its response to that strike. The Employer took no action to exercise that authority prior to the termination of the strike. The Union terminated the strike on May 5 by presenting the Employer with a written, immediate, and unconditional offer to return to work accompanied by the presence of the formerly striking employees at the Employer's facility for the purpose of resuming their jobs. In response, the Employer exercised its discretion under Section 8(d). Without making any reservation of rights, on May 5, the Employer chose to respond to the unlawful strike and the unconditional offer to return to work by imposing a lockout. Imposition of this lockout constituted the full exercise of the Employer's rights under Section 8(d). By making this affirmative choice of response, the Employer reemployed the bargaining unit members by according them the status of employees whose work has ceased as a consequence of a current labor dispute (i.e., the lockout) within the meaning of Section 2(3). From the time the Employer imposed its lockout on May 5, the bargaining unit members regained protected status under the Act. On August 4, the Employer terminated the bargaining unit members for the stated reason of their participation in the strike. As those bargaining unit members were protected from discrimination on the basis of their union affiliations and activities at the time they were terminated, the terminations were unlawful within the meaning of the Act.

In reaching these ultimate legal conclusions, I have given careful thought to the application of the principles of statutory construction mandated by the Board and its reviewing authorities when considering issues arising under Section 8(d). By treating the concept of "reemployment" as requiring an affirmative action by the employer that consists of an act of recognition of a resumption of the continuing employment relationship despite the illegal strike, I am able to harmonize the language of Section 8(d) with the closely related definition of employment contained in Section 2(3).⁵⁰

Beyond achieving the goal of promoting internal consistency in the interpretation of the various sections of the Act, I believe that the approach taken in this decision also advances the policy objectives intended by Congress. In *Lion Oil*, supra., 352 U.S. at 289, the Court described those objectives as involving a "dual purpose" designed to "substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit." The Court went on to hold that "[a] construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it." It is evident to me that the broad construction of the penalty contained in Section 8(d) as urged by

the Company would frustrate those Congressional objectives. If an employer were held to retain the power to discharge former strikers long after the strike was voluntarily ended and a lockout declared, the balance of economic power would be grossly upset with the resulting prospects of increased risk of economic disruption and loss of protection for the rights of employees.⁵¹

By contrast, the interpretation persuasively spelled out by the Sixth Circuit in *Shelby*, supra., places careful limits on the punitive power granted to employers. It affords employers victimized by an illegal strike a deliberately circumscribed opportunity to exercise broad discretion in framing a response to the strike. While the discretion is virtually unlimited, the opportunity to exercise that discretion is properly constrained so as to require the employer to make one discrete and final choice. If the employer elects to exercise that choice by imposing a response other than immediate termination of the strikers, then the parties resume their employment relationship in the manner normally contemplated under the Act. By holding the Company to its choice of imposing a lockout as its response to the unlawful strike, the dual objectives of Congress are best effectuated. There is nothing unfair in holding the Employer to its own commitment expressed in its written response to the Union's unconditional offer to return to work. In that document, the Company formally acknowledged that the former strikers were "employees" who were locked out, but who retained the right to be "expeditiously returned to work" once that lockout was resolved. (GC Exh. 8 p. 1.)

Having determined the manner for application of Section 8(d) to the events in controversy, it remains necessary to evaluate the Employer's compliance with Section 8(a)(3) and (1). During the trial, the lawyers and I speculated regarding the applicability of the Board's dual motive analysis to the facts of this case.⁵² See, for example, Transcript. 60. On reflection, I agree with counsel for the General Counsel's position in his brief that it is unnecessary to engage in such a motivational inquiry. (See GC Br. at pp. 20–22.) In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–35 (1967), the Supreme Court delineated a class of cases involving conduct by an employer that was "inherently destructive" of employee rights to such a degree that other evidence of motivation was not required and the burden of proof was necessarily shifted to the employer to demonstrate a substantial and legitimate business basis for the conduct. In *Freeman Decorating Co.*, supra, 336 NLRB at 9,

⁵⁰ Such a harmonizing construction is also consistent with the mandate expressed by Congress in Sec. 13 of the Act, which provides that, "[n]othing in this Act, except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right." The Board has characterized the effect of Sec. 8(d) as "harsh" and sometimes even "draconian." *Freeman Decorating Co.*, supra, 336 NLRB at 7 and 8. The result I reach in this case serves to limit the impact of the subsection in a manner consistent with the overall Congressional intent regarding preservation of the right to strike as expressed in Sec. 13.

⁵¹ Under the Company's view of the law, there would be virtually no end point for the right of an employer to discharge former illegal strikers. For example, in *Bud Antle, Inc.*, 347 NLRB 87 (2006), rev. denied 539 F.3d 1089 (9th Cir. 2008), a lockout persisted for 14 years before the employer reinstated the employees. Presumably, under the employer's theory, if that lockout had been preceded by an unlawful strike in violation of Sec. 8(d), the employer in that case could have chosen to discharge strikers at any time during the 14-year lockout. Such a sweeping construction would only serve to frustrate the Congressional objectives.

⁵² The definitive formulation of that analysis is found in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 US 393, 399–403 (1983).

the Board applied this doctrine in the context of Section 8(d). It held:

[I]t is well established that some employer actions may be so “inherently destructive” of the rights protected by Section 7 that the Board may fairly infer unlawful animus from those actions. We have previously found, with judicial approval, that such actions include terminating . . . all of the . . . employees in a bargaining unit solely because they are affiliated with . . . a union. [Citations omitted.]

In this case, the uncontroverted documentary evidence establishes that the Company discharged all of the bargaining unit members on August 4 for the sole reason that they “participated” in the strike of May 1–5.⁵³ (GC Exh. 47. See also GC Exh. 26.) It is clear that the only employees discharged on August 4 were those who belonged to the Union. In fact, management decided to clean house with a very broad broom. It not only terminated those union members who withheld their labor during the strike, it also chose to fire union members who were on sick leave, workers’ compensation, or layoff status at the time of the strike. The only common denominator was the union affiliation of the discharged employees. In such circumstances, I readily conclude that the unlawful discriminatory motivation is established and that the Employer has not presented any legitimate business justification for the discharges. *Catalytic Industrial Maintenance*, 301 NLRB 342 (1991), enf’d, 964 F.2d 523 (5th Cir. 1992). Because it discriminatorily discharged all of its bargaining unit employees due to their union affiliation and participation in union activities, the Company engaged in conduct that was inherently destructive of protected rights and lacking in any legitimate business purpose. That conduct violated Section 8(a)(3) and (1) of the Act.

In addition to alleging unlawful discharge of the bargaining unit members, the General Counsel contends that the Employer violated Section 8(a)(5) of the Act by withdrawing recognition from the Union as the collective-bargaining representative of those unit members. This allegation is intimately connected to the 8(d) issue. As the Third Circuit has observed, once an employer has taken affirmative action that causes the illegal strikers to regain their protected status, “likewise, the Union regain[s] its position as the bargaining representative of the employees.” *NLRB v. Cast Optics Corp.*, 458 F.2d 398 (3d Cir.), cert. denied 409 U.S. 850 (1972). It follows that, once an employer has responded to unlawful conduct taken by a union in violation of Section 8(d) in a manner other than termination, it no longer possesses any right to withdraw recognition from the union based on that strike. *Freeman Decorating Co.*, supra, 336 NLRB at 17.

While it is clear that the General Counsel’s legal theory is well grounded, I cannot say the same for the facts alleged to support application of that theory to this allegation of the complaint. On August 14, the Company’s negotiating team did

refuse to engage in collective bargaining with the Union regarding terms of a new agreement. When McKnight, the Union’s outside counsel, pressed Lillie about the Employer’s position, Lillie explained that “we would talk about effects with that group [the former strikers], but their status was unprotected under the Act . . . we were not talking to that group about anything other than effects.” (Tr. 697.) It would appear from this that the Employer was not issuing a blanket withdrawal of recognition.

This interpretation is reinforced by the fact that the Employer continued to respond to its obligation, on demand, to provide the Union with information relevant to its status as the bargaining representative of the unit members. On August 25, Daniel Cohen, an attorney for the Company, wrote to McKnight, “[i]n response to your inquiries on August 14.” (GC Exh. 31.) He proceeded to answer four questions posed by counsel for the Union. Cohen concluded his letter by advising McKnight to contact him, “[s]hould you have any further inquiries.” (GC Exh. 31.) On the same day, McKnight did make another written demand for information. Cohen provided that information by letter dated September 3. (GC Exh. 35.) In the present trial proceeding, the Company has consistently maintained that it did not withdraw recognition from the Union. As trial counsel stated during the proceedings, “[w]e still have that obligation to bargain with them.” (Tr. 423.)

The state of the evidence, particularly in light of the documentary record, demonstrates that the General Counsel has failed to meet his burden of proving that the Company withdrew recognition from the Union as bargaining representative of the unit members. To the contrary, the Employer’s actions subsequent to August 14 indicate that it continued to view itself as bound by a legal obligation to respond to the Union’s demands for information as enforced by Section 8(a)(5). As I will discuss immediately below, the Employer attempted to restrict the subjects about which it would bargain with the Union, but the evidence is insufficient to support a finding that the Employer intended to completely sever its relationship with the Union by withdrawing recognition as alleged by the General Counsel. As a result, I will recommend that this complaint allegation be dismissed.

Regardless of whether the Employer actually withdrew recognition from the Union, the General Counsel also alleges that, since August 14, the Company has violated Section 8(a)(5) of the Act by failing and refusing to meet and bargain with the Union. It is undisputed that the parties had scheduled a bargaining session on that date. The session was to be held at a hotel. In accord with this plan, the separate negotiating teams and the mediator arrived at the hotel. At this point, the Employer’s negotiating team informed the mediator that they were not going to meet with the Union’s negotiators. Winkle provided testimony that, when the Union negotiators confronted the managers regarding their refusal to meet, Lillie explained that “[w]e’re not going to come and bargain. All the employees have been terminated.” (Tr. 138.) Lillie indicated that the Employer was insisting on limiting any future bargaining to the effects of its termination decision. Since August 14, the Employer has not bargained with the Union about any of the terms and conditions of employment for the bargaining unit members.

⁵³ As was so often true in this trial, Viar attempted to obfuscate this point by claiming that the decision to discharge the bargaining unit members was based on a number of reasons. Nevertheless, ultimately, he conceded that “[t]here were a variety of factors we looked at, but chief among them was the illegal strike.” (Tr. 729.)

As long ago as the Board's holding in *Fort Smith Chair Co.*, supra, it has been clear that the discharge of illegal strikers pursuant to Section 8(d) also has consequences for the union that has represented them. As the D.C. Circuit observed while affirming the Board's decision in that case:

The strike being unlawful, the participants in it became subject to a lawful power of discharge in the employer; and the exercise of that power could not result in a violation by the employer of Sections 8(a)(3) and (1). The discharge in this case having resulted in loss by the Union of its majority representation, the failure by the Company to treat with it after such discharge is not a violation of Section 8(a)(5) and (1).

Furniture Workers v. NLRB, 336 F.2d 738 (DC Cir.), cert. denied 379 U.S. 838 (1964). Of course, the opposite result applies when an employer chooses to forego the right to discharge unlawful strikers. Once those strikers have regained their status under the Act, their collective-bargaining representative has also regained its position within the meaning of the Act. See my earlier discussion regarding the General Counsel's withdrawal of recognition allegation and my citations to *NLRB v. Cast Optics Corp.*, supra, and *Freeman Decorating Co.*, supra.

It is undisputed that the Company failed and refused to meet with the Union in order to bargain about terms and conditions of employment for the unit members on August 14 and at all times thereafter. It is elementary that such conduct directed toward the lawful representative of the employees constitutes a dereliction of the overall duty "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement" as required by Section 8(d). As such, it constitutes a violation of Section 8(a)(5). *Pavilions at Forrestal*, 353 NLRB 540 (2008).

CONCLUSIONS OF LAW

1. By discharging all of the bargaining unit members on August 4, 2008, based on their membership in the Union and their activities in support of the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to meet and bargain collectively with the Union since August 14, 2008, regarding the terms and conditions of employment for the bargaining unit members, the Company violated Section 8(a)(5) and (1) of the Act.

3. The Company has not withdrawn its recognition from the Union as the collective-bargaining representative of the unit members in violation of Section 8(a)(5) and (1) of the Act, as alleged by the General Counsel.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

First and foremost, the Respondent having discriminatorily discharged the members of the bargaining unit,⁵⁴ it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵⁵

In pretrial conferences with the lawyers involved in this proceeding, I raised the question of the precise scope of any remedy in the event a violation of the Act was found. In advance of the trial date, on June 18, 2009, I wrote to the lawyers in order to better delineate the issue by advising them of my tentative conclusion, including a list of the Board's precedents that I had consulted. (ALJ Exh. 1.) At that time, I indicated that it appeared that those precedents required a reinstatement order and a backpay remedy from the date of any unlawful discharge. I note that the Employer has not raised any contrary argument in its post trial brief.

Having now analyzed this question in light of my conclusion that the Company did unlawfully discharge employees who had previously been locked out of their jobs, I again conclude that Board precedent requires that the remedy include reinstatement and backpay from the date of discharge, in this case August 4, 2008. The leading case establishing the extent of the remedy for unlawfully discharged strikers is *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979), holding that such discriminatees are entitled to reinstatement and backpay from the date of their unlawful discharge. In *Grosvenor Resorts*, 336 NLRB 613, 618 (2001), enf. 52 Fed. Appx. 485 (11th Cir. 2002), the Board reiterated the point succinctly and explicitly, observing that "backpay is awarded to wrongfully discharged striker from date of unlawful discharge rather than subsequent date on which strike ended." See also the Board's extensive discussion of the parameters of this issue in *Detroit Newspaper Agency*, 343 NLRB 1041 (2004), enf. 171 Fed. Appx. 352 (D.C. Cir. 2006), cert. denied 549 U.S. 813 (2006). Finally, I note that the Board applies this remedial policy in the specific area of violations of Section 8(d). In *ABC Automotive Products Corp.*, 307 NLRB 248, 249 (1992), enf. 986 F.2d 500 (2d Cir. 1992), the Board, citing *Abilities & Goodwill*, supra., ordered this remedy for employees wrongfully discharged after engaging in a strike that violated Section 8(d). As I observed in my June letter, there can

⁵⁴ The parties have stipulated to a list of bargaining unit employees and their status as of May 1, 2008. (GC Exh. 48.) The precise terms of the stipulation are addressed at Tr. 67-73.

⁵⁵ As has become a somewhat tedious routine these days, the General Counsel asks me to ignore longstanding Board precedent by ordering that interest on this award be compounded quarterly. On several occasions, I have previously discussed my concerns about this policy of seeking such relief from administrative law judges. For example, see *Frye Electric, Inc.*, 352 NLRB 345, 358 (2008). Nothing has changed. The Board continues to reject the General Counsel's position. For a recent example, see *Spring Air West, LLC*, 354 NLRB No. 110 fn. 1 (2009), citing *Rogers Corp.*, 344 NLRB 504 (2005). Thus, it continues to be improper for me to grant the General Counsel's request for the reasons explained in *Frye*.

be no material difference in remedy based on the fact that the bargaining unit members in this case were locked out rather than engaged in a strike at the time of their unlawful discharges. In other words, if strikers who were actively withholding their services are entitled to backpay and reinstatement from the date of discharge, locked out employees who were not withholding their labor would certainly merit the same treatment.

Finally, I conclude that it is necessary to address a remedial matter that has not been raised by the parties. In *Willamette Industries, Inc.*, 341 NLRB 560, 564 (2004), the Board discussed the propriety of ordering a remedy in the absence of a specific request. It noted that,

it is well established that the General Counsel's failure to seek a specific remedy does not limit the Board's authority under Section 10(c) of the Act to fashion an appropriate make-whole remedy. The Board may grant such a remedy as will effectuate the purposes of the Act, whether the remedy is specifically requested or not. [Citations omitted.]

Of course, I recognize that imposition of a remedy in such circumstances should be a rare event.⁵⁶ Nevertheless, at this stage of proceedings, after finding the Employer's behavior to be egregious, the fundamental responsibility to fashion a remedial plan that will secure that Employer's future compliance with the Act and prevent further unlawful discrimination against the wrongfully discharged employees rests in my hands. Upon reflection, I conclude that such a plan requires imposition of a broad cease-and-desist order.

Long ago, the Supreme Court observed that "[t]he breadth of the [remedial] order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). In implementing this principle, the Board has enunciated clear standards. In its leading case, *Hickmott Foods*, 242 NLRB 1357, 1358 (1979), it held:

[S]uch an order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, each case will be analyzed to determine the nature and extent of the violations committed by a respondent so that the Board may tailor an appropriate order. [Footnote omitted.]

More recently, the Board elaborated on the *Hickmott Foods* standard in *Five Star Mfg.*, 348 NLRB 1301, 1302 (2006), enf. 278 Fed. Appx. 697 (8th Cir. 2008), holding that:

the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect

the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. [Internal quotation marks and citation omitted.]

The Board went on to explain that it was ordering a broad cease-and-desist order in that case despite the absence of any prior history of violations, noting that the absence of such history "does not, in itself, dissipate the egregiousness of the conduct involved in this proceeding." 348 NLRB at 1302–1303. [Internal quotation marks and citation omitted.]

In this case, I have concluded that several factors require the imposition of a broad cease-and-desist order as an essential element of the remedy. In the first instance, I have considered the sweeping impact of the unfair labor practices that have been committed by this Employer. While it is true that the entire scenario was precipitated by the Union's inadvertently unlawful strike, the evidence demonstrated that the Employer initially chose to respond to this event in a measured fashion by imposition of a lockout. Subsequently, the parties continued their longstanding collective-bargaining relationship by engaging in bargaining for a new agreement.

During that period, the Employer made numerous statements indicating that it intended to maintain the relationship with the Union. This pattern of promises began with the language of the original lockout letter that indicated that the bargaining unit members could expect to be "expeditiously returned to work" upon resolution of the lockout. (GC Exh. 8 p. 1.) The Company's own minutes of the bargaining session on July 2 show management representing to the Union's negotiators that the replacement workers are temporary. In fact, those minutes show Lillie telling the Union that, "[p]lans for how to bring back work force [are] already being discussed." (R. Exh. 4 p. 10.) Despite these promises and commitments, on August 4, the Company made an abrupt, sweeping, and unlawful change in direction.⁵⁷ By belatedly choosing to terminate the entire bargaining unit, the Employer chose what can only be described as the labor relations equivalent of a nuclear option—a flagrantly egregious and unlawful course of conduct.

In *National Steel Supply, Inc.*, 344 NLRB 973 (2005), enf. 207 Fed. Appx. 9 (2d Cir. 2006), the Board assessed a similar degree of misconduct when considering imposition of another type of extraordinary remedy, a bargaining order. It recalled the venerable labor law designation of the "actual discharge of union adherents" as "hallmark violations" of the Act. 344 NLRB at 976, citing *NLRB v. Jamaica Towing*, 632 F.2d 208, 212 (2d Cir. 1980). The Board went on to note that the gravity of the misconduct was underscored when the termination of

⁵⁶ For instance, in my almost nine years of service as a judge for the Board, I cannot recollect a prior occasion when I recommended such a remedy.

⁵⁷ This abrupt reversal of position is highlighted by examination of a letter to the Union written by Kirk on June 13. In this correspondence, he advised the Union that, "consistent with the National Labor Relations Act," the Employer would no longer enforce the dues provision of the expired collective-bargaining agreement. (GC Exh. 15.) This reference comes perilously close to conceding the ultimate issue in this trial and certainly suggested to the Union that the Employer viewed the Act's protections as applying to the locked out bargaining unit members. This stands in stark contrast to the actions taken by the Company on August 4.

union supporters consisted of a mass discharge. It characterized conduct of the sort indulged in by this Employer as follows: “[t]erminating a majority of the bargaining unit is unlawful conduct that goes to the very heart of the Act.” 344 NLRB at 977. Thus, the scope and extent of the Company’s unlawful activity in this case constitutes the first factor that persuades me to recommend a broad cease-and-desist order.

The second such factor consists of the continuity in management of the Company. Obviously, corporations do not have proclivities to violate the law, nor do they have hostility to the objectives embodied in the Act. These entities can only act in furtherance of the personal desires and attitudes of their managers. Therefore, when management has changed since the date of the commission of unfair labor practices, this may well constitute a mitigating factor. See, for example, *Audubon Regional Medical Center*, 331 NLRB 374, 377 (2000). By the same token, when management remains intact, this is a strong indicator of the need for remedial measures that are specifically designed to address the attitudes of the very individuals who were responsible for prior extensive and severe misconduct. In this case, all of the key management officials who directed the Employer’s labor relations policy during the events in question remain in place. Furthermore, the Employer “has presented no evidence showing a new willingness to allow its employees to freely exercise their rights.” *California Gas Transport, Inc.*, 347 NLRB 1314, 1326 (2006), enf. 507 F.3d 847 (5th Cir. 2007).

Not only do the same managers remain at the helm, but the economic conditions that spurred the shift to an unlawful strategy designed to rid the workplace of the Union remain in place. In particular, the Company’s success in maintaining its operations with a replacement work force played a prominent role in fostering this change in attitude. As Kirk colorfully described it, management felt that its successful efforts to maintain production during the strike represented, “lightning in a bottle.” (Tr. 845.) Viar confirmed that the replacements were providing “good performance,” and that during the period between May and August, “I can tell you that things were going along very well, good, very well, yes.” (Tr. 326, 327.) He admitted that management’s happiness with the replacement work force was a factor that was taken into account in reaching the decision to terminate the bargaining unit employees. (Tr. 730.) I conclude that the economic factors that influenced management to make a radical and unlawful change in its stance toward the Union will likely persist and drive the future behavior of those officials.

Once it determined to eliminate the Union from its workplace, management took dramatic and egregious actions in violation of the Act. These actions consisted of the discharge of its entire bargaining unit work force, regardless of whether each individual had participated in the strike or not, and the blanket refusal to engage in any further negotiations with the Union regarding the terms and conditions of employment.

The final factor that influences me to recommend extraordinary relief in order to effectively protect the rights of the discharged employees is the behavior of the key management officials during the course of this trial. I have already described the persistent efforts those officials made to fabricate evidence

to justify their egregious misconduct. All of the Employer’s key witnesses were extensively impeached by their own prior statements and affidavits.⁵⁸ Furthermore, they persisted in providing testimony that was patently inaccurate and sometimes even nonsensical.⁵⁹ Beyond this, one key witness attempted to twist and distort a union official’s statement in an effort to falsely accuse that official of racism. The behavior of the Employer’s managers on the witness stand provided strong evidence of their hostility to the purposes underlying the Act and to their ingrained proclivity to engage in conduct designed to frustrate those purposes. In this regard, I find the situation to be very similar to that demonstrated in *ADB Utility Contractors*, 353 NLRB 166 (2008). In that case, the Board adopted my recommended remedies, including a broad cease-and-desist order, due in part to misconduct manifested by management witnesses during the trial.

Based on the egregious nature and sweeping extent of the Company’s unfair labor practices, the likely persistence of ingrained opposition to the purposes of the Act due to the continuing tenure of the key management officials, and the depraved state of mind manifested by those officials in their conduct at trial, I conclude that it is necessary to recommend a broad cease-and-desist order. I find it necessary to conclude that a narrow cease-and-desist order will not serve to prevent likely future misconduct. As the Supreme Court noted long ago, when an employer’s intent to violate the Act is made clear by its pattern of past misconduct, “it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.” *Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 705–706 (1951), citing *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947). In this case, I recommend that the Board foreclose other avenues of misconduct likely to otherwise be exploited by this Employer in its efforts to frustrate the purposes embodied in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁰

ORDER

The Respondent, Douglas Autotech Corporation, Bronson, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁵⁸ Some instances of impeachment were among the most striking I have witnessed in 23 years as a judge. For example, counsel for the Union asked Viar if he had “surmised” that the Union had failed to provide the 8(d) notice. Viar testified, “Counsel, I guess I don’t know how to answer the question because I don’t know what ‘surmise’ means. I apologize. I’m not playing games. I’m a smart guy, but I don’t know what you mean.” (Tr. 499.) He was promptly impeached with his statement in an affidavit that “[w]e first surmised on May 9th that there was [no] 30-day notice when the strike began.” (Tr. 499.)

⁵⁹ For example, I refer here to such conduct as Viar’s obstinate refusal to concede the obvious truth, i.e. that his letters to the bargaining unit members on August 4 were termination letters.

⁶⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against its employees based on their membership in, support for, or activities on behalf of, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822 or any other labor organization.

(b) Failing and refusing to engage in collective bargaining with the exclusive collective-bargaining representative of its employees in the unit set forth below regarding the terms and conditions of employment.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822 as the exclusive representative of its employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees employed at its Bronson, Michigan plant; but excluding superintendents, foremen, assistant foremen, time study men,⁶¹ timekeepers, plant protection employees, stock and service manager, receiving room foremen, first aid nurse, administrative office employees, clerical or secretarial assistants, payroll clerks, and all other guards and supervisors as defined in the Act.

(b) Rescind the August 4, 2008 discharges of all bargaining unit employees, and within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Within 14 days from the date of the Board's Order, offer the unlawfully discharged bargaining unit employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(d) Make all of the unlawfully discharged bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

⁶¹ The parties' lengthy bargaining history is underscored by the outdated language of the formal bargaining unit description containing long-outdated gender specific language.

(f) Within 14 days after service by the Region, post at its facility in Bronson, Michigan, copies of the attached notice marked "Appendix."⁶² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2008.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for maintaining membership in, or engaging in activities in support of, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and its Local 822 or any other union.

WE WILL NOT, on request, fail or refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and its Local 822 as the exclusive bargaining representative of our employees in the following appropriate unit concerning

⁶² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees employed at the Bronson, Michigan plant; but excluding superintendents, foremen, assistant foremen, time study men, timekeepers, plant protection employees, stock and service manager, receiving room foremen, first aid nurse, administrative office employees, clerical or secretarial assistants, payroll clerks, and all other guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL rescind the August 4, 2008 unlawful discharges of all bargaining unit employees and, WE WILL, within 14 days from the date of the Board's Order, remove any reference to the unlawful discharges from our files and records, and, WE WILL, within 3 days thereafter, notify each of these employees in writ-

ing that this has been done and that the unlawful discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the bargaining unit members unlawfully discharged on August 4, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL, make all of the bargaining unit employees whole for any loss of earnings and other benefits resulting from their unlawful discharge on August 4, 2008, less any net interim earnings, plus interest.

DOUGLAS AUTOTECH CORPORATION